APPENDIX

Supreme Court of the United States

October Term, 1972

No. 72-844

E. E. FALK, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK, ET ALS.,
Petitioners,

v.

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

Petition For Certiorari Filed December 8, 1972
Certiorari Granted February 26, 1973

INDEX*

* The previous and Judgment of the courts below are printed in the Appendix to the Petition for a Writ of Certiorari.

DOCKET ENTRIES

Date	PROCEEDINGS
1969	
Jan. 30	Complaint filed and summons issued.
Feb. 24	Answer of all Defendants filed by counsel.
Mar. 10	Petitioners' interrogatories filed.
May 14	Answer to Petitioners' interrogatories, lodged.
July 23	Petitioners' request for admissions filed.
Sept. 12	Answer to Petitioners' interrogatories lodged 5/14/69 filed by leave of Court.
Sept. 12	Answer to Petitioners' interrogatories (second set) lodged 9/5/69 filed by leave of Court.
Oct. 9	Stipulations of facts, filed.
1970	
Jan. 6	Opinion and Order of Court, that the relief sought is denied and the suit Dismissed, filed.
Mar. 13	Notice of Appeal filed by United States.
1971	
Mar. 3	Opinion of the United States Court of Appeals, reversing and remanded to the District Court for further proceedings.
June 2	Petition for a Writ of Certiorari to the Fourth Circuit Court of Appeals of the United States, filed.
July 28	Opinion of the District Court for the Eastern District of Virginia awarding pre-judgment interest.
Oct. 12	Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit denied.

1972

Jan. 28—Entry of final Order in the District Court for the Eastern District of Virginia.

Feb. 28—Notice of Appeal filed.

Sept. 11—Per Curiam Opinion of the United States Court of Appeals for the Fourth Circuit affirming the award of pre-judgment interest.

Dec. 8—Petition for a Writ of Certiorari to the Fourth Circuit Court of Appeals of the United States, filed.

1973

Feb. 26—Petition for a Writ of Certiorari granted limited to Questions 2 and 3 presented by the petition.

[Caption omitted]

COMPLAINT

(Filed in U. S. District Court January 30, 1969)

Plaintiff George P. Shultz, Secretary of Labor, United States Department of Labor, brings this action to enjoin defendants E. E. Falk, A. L. Drucker, E. B. Drucker, David Falk, and R. E. Smith from violating the provisions of sections 15(a)(2) and 15(a)(5) of the Fair Standards Act of 1938, as amended (29 U.S.C. *et seq.*), hereinafter referred to as the Act, and to restrain defendants from any withholding of payment of minimum wages and overtime compensation found by the Court to be due to employees under the Act.

I

Jurisdiction of this action is conferred upon this Court by section 17 of the Act.

II

(a) Since August 25, 1966, defendants E. E. Falk, A. L. Drucker, E. E. Drucker, David Falk, and R. E. Smith, have been and are partners trading as Drucker & Falk, 131 - 26th Street, Newport News, Virginia, within the jurisdiction of this Court, in the business of selling real estate and insurance and managing rental property.

(b) Defendant E. E. Falk resides at 27 Garland Drive, Newport News, Virginia, within the jurisdiction of this Court, and since August 25, 1966, has been and is actively engaged in the control and supervision of the operations of Drucker & Falk, 131 - 26th Street, Newport News, Virginia, and acts and since August 25, 1966, has acted directly and indirectly in the interest of said Drucker & Falk in relation to its employees.

(c) Defendant A. L. Drucker resides at 511 Chesapeake Avenue, Newport News, Virginia, within the jurisdiction of this Court, and since August 25, 1966, has been and is actively engaged in the control and supervision of the operations of Drucker & Falk, 131 - 26th Street, Newport News, Virginia, and acts and since August 25, 1966, has acted directly and indirectly in the interest of said Drucker & Falk in relation to its employees.

(d) Defendant E. B. Drucker resides at 23 Garland Drive, Newport News, Virginia, within the jurisdiction of this Court, and since August 25, 1966, has been and is actively engaged in the control and supervision of the operations of Drucker & Falk, 131 - 26th Street, Newport News, Virginia, and acts and since August 25, 1966, has acted directly and indirectly in the interest of said Drucker & Falk in relation to its employees.

(e) Defendant David Falk resides at Kings Mill Dairy Farm, Williamsburg, Virginia, within the jurisdiction of

this Court, and since August 25, 1966, has been and is actively engaged in the control and supervision of the operations of Drucker & Falk, 131 - 26th Street, Newport News, Virginia, and acts and since August 25, 1966, has acted directly and indirectly in the interest of said Drucker & Falk in relation to its employees.

(f) Defendant R. E. Smith resides at 14 Garland Drive, Newport News, Virginia, within the jurisdiction of this Court, and since August 25, 1966, has been and is actively engaged in the control and supervision of the operations of Drucker & Falk, 131 - 26th Street, Newport News, Virginia, and acts and since August 25, 1966, has acted directly and indirectly in the interest of said Drucker & Falk in relation to its employees.

III

The business activities of the defendants, as described herein, are and since August 25, 1966, have been related and performed through unified operation and common control for a common business purpose, and constitute and since August 25, 1966, have constituted an enterprise within the meaning of section 3(r) of the Act.

IV

(a) During the period since August 25, 1966, the total annual gross volume of sales of the enterprise referred to and described in the preceding paragraph has been not less than one million dollars ($1,000,000), and some of the defendants' establishments have had at least two or more employees engaged in commerce or in the production of goods for commerce. Thus, each such establishment, since August 25, 1966, has been and is an enterprise engaged in

commerce or in the production of goods for commerce within the meaning of section 3(s)(3) of the Act, as amended by the Fair Labor Standards Amendments of 1961, 75 Stat. 65.

(b) During the period since February 1, 1967, the annual gross volume of sales made or business done by the enterprise referred to and described in paragraph III of this Complaint has been not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated), and it has and since February 1, 1967, has had two or more employees engaged in commerce or in the production of goods for commerce. By virtue of the foregoing, defendants' activities constitute and since February 1, 1967, have constituted an enterprise engaged in commerce or in the production of goods for commerce within the meaning of sections 3(r) and 3(s)(1) of the Act, as amended by the Fair Labor Standards Amendments of 1966, 80 Stat. 830.

V

(a) During the period since August 25, 1966, the defendants have repeatedly violated, and are violating, the provisions of sections 6(a)(1) and 15(a)(2) of the Act by employing employees in enterprises engaged in commerce or in the production of goods for commerce and by paying them wages at rates less than $1.25 an hour during the period from August 25, 1966, to February 1, 1967; less than $1.40 an hour during the period from February 1, 1967, to February 1, 1968; and less than $1.60 an hour thereafter.

(b) During the period since February 1, 1967, the defendants have repeatedly violated, and they are violating, the provisions of sections 6(b) and 15(a)(2) of the Act by employing employees in an enterprise engaged in commerce

or in the production of goods for commerce and by paying such employees wages at rates less than $1 an hour during the period from February 1, 1967, to February 1, 1968, and at rates less than $1.15 an hour during the period since February 1, 1968.

VI

(a) During the period since August 25, 1966, the defendants have repeatedly violated, and they are violating, the provisions of sections 7(a)(1) and 15(a)(2) by employing many of their employees in enterprises engaged in commerce or in the production of goods for commerce for hours in excess of 40 a week without compensating them for such excess hours at rates not less than one and one-half times the regular rates at which they were employed.

(b) During the period since February 1, 1967, the defendants have repeatedly violated, and they are violating, the provisions of sections 7(a)(2) and 15(a)(2) of the Act by employing many of their employees in an enterprise engaged in commerce or in the production of goods for commerce, for hours in excess of 44 a week during the period from February 1, 1967, to February 1, 1968, and for hours in excess of 42 a week during the period since February 1, 1968, without compensating them for such excess hours at rates not less than one and one-half times the regular rates at which they were employed.

VII

(a) During the period since August 25, 1966, the defendants have repeatedly violated, and they are violating, the provisions of sections 11 and 15(a)(5) of the Act, in that they have failed to make, keep, and preserve adequate and accurate records of their employees and of the wages,

hours, and other conditions and practices of employment maintained by them as prescribed by regulations issued pursuant to section 11(c) of the Act and found in Title 29, Chapter V, Code of Federal Regulations, Part 516, in that the records kept by the defendants fail to show adequately and accurately, among other things, the hours worked each workday and the total hours worked each workweek by many of their employees.

(b) During the period since August 25, 1966, the defendants have repeatedly violated, and they are violating, the provisions of sections 11 and 15(a)(5) of the Act, in that they have failed to post and keep posted, at the places of employment of their employees, a notice pertaining to the applicability of the Act, as prescribed by regulations issued pursuant to section 11(c) of the Act and found in Title 29, Chapter V, Code of Federal Regulations, Part 516.4.

VIII

Section 17 of the Act expressly provides that the District Courts of the United States shall have jurisdiction to restrain violations of section 15 of the Act, including, in the case of violations of section 15(a)(2), the restraint of any withholding of payment of minimum wages and overtime compensation found by the Court to be due to employees under the Act.

Wherefore, cause having been shown, plaintiff prays judgment permanently enjoining and restraining defendants, their agents, servants, employees and all persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise from violating the provisions of sections 15(a)(2) and 15(a)(5) of the Act, and restraining the defendants from continuing to withhold any payment of minimum wages

and overtime compensation found by the Court to be due to their employees under the Act, together with interest at six percent a year from the date of the withholding, and for such further relief as the Court may deem appropriate.

Edward B. Friedman
Acting Solicitor of Labor

Jeter S. Ray
Regional Attorney

Sylvia S. Ellison
Chief Trial Attorney

William H. Horkan
Deputy Chief Trial Attorney

Thomas E. Korson
Attorney

Attorneys for Plaintiff

Of Counsel

C. V. Spratley, Jr.
United States Attorney

By Roger T. Williams
Assistant United States Attorney

(Captioned Omitted)

ANSWER

(Filed in U. S. District Court February 24, 1969)

This day come the defendants, E. E. Falk, A. L. Drucker, E. B. Drucker, David Falk and R. E. Smith, individually and as partners in Drucker & Falk, and file this their individual and collective Answer to the Complaint filed herein, and do deny the allegations of subject Complaint and in that regard doth say as follows:

1. That they do admit the allegations of Paragraph I.
2. That they do admit the allegations of Paragraph II.
3. That they do not deny the allegations of Paragraph III.
4. That they do deny the allegations of Paragraph IV.
5. That they do deny the allegations of Paragraph V.
6. That they do deny the allegations of Paragraph VI.
7. That they do deny the allegations of Paragraph VII.
8. That they do deny any allegations of violation as alleged in said Complaint.
9. That they do deny the prayer for relief, but do assert that even if there were grounds for subject prayer, it is barred by the statute of limitations.

Such other defenses as may arise on or before trial of this cause.

E. E. Falk,
A. L. Drucker,
E. B. Drucker,
David Falk and
R. E. Smith

Herbert V. Kelly, p.d.
Jones, Blechman, Woltz & Kelly
227 27th Street
Newport News, Virginia 23607

(Caption Omitted)

PLAINTIFF'S INTERROGATORIES

(Filed in U. S. District Court March 10, 1969)

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, plaintiff requests that, within 15 days of service hereof, defendants answer in writing and under oath the following interrogatories, which are continuing in nature and which, unless otherwise specified, pertain to the period since January 30, 1967.

1. Identify the buildings which have been and are being operated or managed by the defendants, including the locations, by street address and city, town or village, of all such buildings, the owners of such buildings and their addresses.

2. Identify the buildings which have been and are being operated or managed by the defendants which have telephone switchboards operated by one or more persons paid by the defendants on their own account or as agents for the owner of the building.

3. Identify the buildings which have been and are being operated or managed by the defendants in which mail is distributed, or otherwise delivered, by one or more persons paid by the defendants on their own account or as agents of the owner of the building, to the tenants or to boxes or pigeonholes assigned to the tenants of such buildings.

4. Identify the buildings which have been and are being operated or managed by the defendants where one or more persons paid by the defendants on their own account or as agents of the owner of the building regularly receive or send correspondence pertaining to the defendants' business or to the business of the building owner across state lines.

5. Identify the buildings which have been and are being operated or managed by the defendants where one or more persons paid by the defendants on their own account or as agents of the owner o fthe building regularly use as part of their duties at such buildings telephone facilities in communications across state lines.

6. Identify the buildings which have been and are being operated or managed by the defendants where persons paid by the defendants on their own account or as agents for the owner of the building regularly order or receive goods, materials, or supplies used in the operation, management, or maintenance of the buildings operated by the defendants, if such goods, materials, or supplies have been shipped across state lines.

7. State the gross volume of rentals collected by the defendants trading as Drucker & Falk for each quarter since January 1, 1966.

8. State the gross commissions or fees received by the defendants in the operation or management of buildings for each quarter since January 1, 1966.

9. Who hires the employees working in the buildings operated or managed by the defendants?

10. Who supervises the employees working in the buildings operated or managed by the defendants?

11. Who has authority to fire the employees working in the buildings operated or managed by the defendants?

12. What is the basis for payment to the defendants by the owners of the buildings operated or managed by the defendants?

13. Are the employees working in the buildings operated or managed by the defendants paid by cash or by check,

and if by check, whose check? How are the payments delivered and by whom?

Sylvia S. Ellison
Chief Trial Attorney

William H. Horkan
Deputy Chief Trial Attorney

Thomas E. Korson
Attorney

Attorneys for Plaintiff
United States Department of Labor

Of Counsel

C. V. Spratley, Jr.
United States Attorney

(Caption Omitted)

ANSWER TO PLAINTIFF'S INTERROGATORIES

(Filed in U. S. District Court May 12, 1969)

This day come the defendants, E. E. Falk, A. L. Drucker, E. B. Drucker, David Falk and R. E. Smith, individually and as partners in Drucker & Falk, and file this their individual and collective Answer to Plaintiff's Interrogatories, as follows:

1. In answer to question number one, the apartment projects managed by the defendants are as follows:

(a) Buildings known as "Andover" owned by Andover Investment Company, located at 2501 East Little Creek Road, Norfolk, Virginia 23518.

(b) Buildings known as "Armstrong" owned by Armstrong Investment Company, 3816 Kecoughtan Road, Hampton, Virginia 23369.

(c) Buildings known as "Bel Meade" owned by Bel Meade Investment Company, 2506 Atwell Drive, Richmond, Virginia 23234.

(d) Buildings known as "Bolling" owned by Bolling Investment Company, 942 Rockbridge Avenue, Norfolk, Virginia 23508.

(e) Buildings known as "Bondale" owned by Bondale Investment Company, 7603 Bondale Avenue, Norfolk, Virginia 23505.

(f) Buildings known as "Chamberlayne Gardens" owned by Chamberlayne Gardens, Inc., 4301 Chamberlayne Avenue, Richmond, Virginia 23227.

(g) Buildings known as "Chesapeake" owned by Chesapeake Investment Company, 3816 Kecoughtan Road, Hampton, Virginia 23369.

(h) Buildings known as "Dresden Arms" owned by Dresden Arms Associates, 616 Dresden Drive, Newport News, Virginia 23601.

(i) Buildings known as "Lakeshore" owned by Lakeshore Associates, 19 Lakeshore Drive, Hampton, Virginia 23366.

(j) Buildings known as "Peninsula" owned by Peninsula Investment Company, 3816 Kecoughtan Road, Hampton, Virginia 23369.

(k) Buildings known as "Pleasant Manor" owned by Pleasant Manor Corporation, 3201 York Street, Hampton, Virginia 23361.

(l) Buildings known as "Presidential Apartments" owned by Presidential Apartment Associates, 616 Dresden Drive, Newport News, Virginia 23601.

(m) Buildings known as "Presidential" owned by Presidential Investment Company, 616 Dresden Drive, Newport News, Virginia 23601.

(n) Buildings known as "Southampton" owned by Southampton Investment Company, 3816 Kecoughtan Road, Hampton, Virginia 23369.

(o) Buildings known as "Warwick Gardens" owned by Warwick Gardens, Incorporated, 614 Peninsula Drive, Newport News, Virginia 23605.

(p) Buildings known as "Warwick Marshall" owned by Warwick Marshall, Incorporated, 614 Peninsula Drive, Newport News, Virginia 23605.

(q) Buildings known as "Executive Suite" owned by Greenwood Company, Incorporated, 2705 West Mercury Boulevard, Hampton, Virginia 23366.

(r) Buildings known as "Ivy-Dresden" owned by Ivy-Dresden Investment Company, 616 Dresden Drive, Newport News, Virginia 23601.

(s) Buildings known as "Mercury" owned by Mercury Investment Company, 1601 Pennwood Drive, Hampton, Virginia 23366.

(t) Buildings known as "Hampton" owned by Hampton Associates, 2717 Willard Road, Richmond, Virginia.

(u) Buildings known as "Glenwood" owned by Glenwood Investment Company, 2705 Byron Street, Richmond, Virginia 23223.

(v) Buildings known as "Sewell", located at 400 West Little Creek Road, Norfolk, Virginia 23505, owned by Sewell Properties Company, 138 - 78th Avenue, Flushing, New York 11367.

(w) Buildings known as "Lakeshore Village" owned by Lakeshore Village Associates, 2717 Willard Road, Richmond, Virginia 23229.

(x) Buildings known as "Shell Gardens" owned by Mr. Abraham Okun, 135 Forsythe Road, Norfolk, Virginia 23505.

(y) Buildings known as "Queens Terrace" owned by Queens Terrace Associates, Massey Building, Fourth and Main Streets, Richmond, Virginia 23219.

(z) Buildings known as "West County Townhouses" owned by West County Townhouse Apartments, 20 Mellen Street, Hampton, Virginia 23363.

(aa) Buildings known as "Plaza Apartments" owned by Arlington Hall Realty Company, 11295 Keystone Island Drive, North Miami, Florida 33162.

(bb) Buildings known as "Newsome" owned by Newsome Townhouses Apartments, 2013 Cunningham Drive, Hampton, Virginia 23366.

(cc) Buildings known as "Robin Hood", located at 5500 Robin Hood Road, Norfolk, Virginia 23513,

owned by Virginia Construction Corporation, Suite 203, 117 East 59th Street, New York, New York 10022.

(dd) Buildings known as "Bel Aire" owned by Bel Aire Investment Corporation, 1513 East Little Creek Road, Norfolk, Virginia 23518.

2. There are no buildings which are being operated or managed by the defendants which have telephone switchboards operated by one or more persons paid by the defendants on their own account or as agents for the owner of the building.

3. There are no buildings which have been or are being operated or managed by the defendants in which mail is distributed, or otherwise delivered, by one or more persons paid by the defendants on their own account or as agents of the owner of the building, to the tenants or to boxes or pigeonholes assigned to the tenants of such buildings.

4. The only buildings operated or managed by the defendants where there is correspondence across state lines are Sewell, Robin Hood and Plaza, as named above, where information is mailed to out-of-state owners.

5. There are no buildings operated or managed by the defendants with regular communication facilities across state lines. In the three cases mentioned in answer No. 4 above, there is some telephone communication.

6. At none of the buildings which have been or are being operated or managed by the defendants do the defendants or their agents regularly order or receive goods, materials or supplies used in the operation, management or maintenance of the buildings which have been shipped across the state lines. Any regular ordering is made through local

suppliers and the origin of their goods is not known by the defendants.

7. Gross volume of rentals collected by the defendants is as follows:

1966	
1st Quarter	$1,311,452.28
2nd Quarter	1,330,638.02
3rd Quarter	1,512,091.16
4th Quarter	1,657,437.91
Total	$5,811,619.37

1967	
1st Quarter	$1,769,010.67
2nd Quarter	1,818,519.05
3rd Quarter	1,998,450.17
4th Quarter	2,079,620.97
Total	$7,725,600.86

1968	
1st Quarter	$2,092,237.23
2nd Quarter	2,144,449.31
3rd Quarter	2,191,971.28
4th Quarter	2,208,428.22
Total	$8,607,086.04

8. Gross commissions or fees received by the defendants are as follows:

1966	
1st Quarter	$ 81,119.54
2nd Quarter	83,730.92
3rd Quarter	93,388.34
4th Quarter	101,827.02
Total	$360,065.82

1967	
1st Quarter	99,057.65
2nd Quarter	104,264.86
3rd Quarter	116,673.69
4th Quarter	114,231.95
Total	$434,228.15

1968	
1st Quarter	$114,992.04
2nd Quarter	112,867.79
3rd Quarter	117,005.78
4th Quarter	117,891.89
Total	$462,757.50

9. Employees working in buildings operated or managed by the defendants are hired for the owner's account by either of the following, depending upon the employment:

Executive Director, Management Department
Assistant Executive Director, Management Department
Area Manager
Project Manager
Maintenance Superintendent

10. Employees working in the buildings are supervised normally by the Maintenance Superintendent or Project Manager for the project.

11. Employees discharged are normally discharged by the Maintenance Superintendent for the particular project.

12. Payment to the defendants on buildings managed or operated by the defendants is on a commission basis on rents collected.

13. Employees working in buildings operated or managed by the defendants are paid from a special payroll ac-

count which is funded by checks drawn weekly on the owner's account and payment is made through this account by Drucker & Falk by check.

E. E. Falk, A. L. Drucker, E. B. Drucker, David Falk and R. E. Smith, Individually and as partners in Drucker & Falk

E. E. Falk
A. L. Drucker
E. B. Drucker
David Falk
R. E. Smith

Herbert V. Kelly, p.d.
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227 - 27th Street
Newport News, Virginia 23607

(Caption Omitted)

PLAINTIFF'S INTERROGATORIES

(SECOND SET)

(Filed in U. S. District Court July 23, 1969)

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, plaintiff requests that, within 15 days hereof, defendants answer in writing and under oath the following interrogatories, which are continuing in nature and which, unless otherwise specified, pertain to the period since January 30, 1967.

14. With reference to defendants' answer to interrogatory 1, does the list of buildings contained in that answer include ail buildings which defendants have managed at any time during the period since January 30, 1967, or does it merely include the buildings which the defendants are managing at the present time? If the list does not include buildings which the defendants managed during some point in the period from January 30, 1967, but which the defendants are not currently managing, state the name of the building or buildings and list the address of each such building or buildings.

15. With reference to defendants' answer to interrogatory 4, state the frequency with which correspondence or other information (pertaining to the buildings mentioned in defendants' answer to interrogatory 4) is transmitted across state lines, and state whether the employees engaged in transmitting such information or correspondence are employed at the buildings or at defendants' offiees located at 131 - 26th Street, Newport News, Virginia.

16. With reference to defendants' answer to interrogatory 5, state the frequency of the communication across

state lines mentioned therein, and list the employees who were and are so engaged in such interstate communications.

17. With reference to defendants' answer to interrogatory 6, list the names and addresses of all your suppliers during the period since January 30, 1966, and list all the supplies which you use and since January 30, 1966, have used in the operation or management of the buildings listed in defendants' answer to interrogatory 1 or any other building. Indicate which supplies are obtained from which suppliers.

18. Are the personell mentioned in defendants' answers to interrogatories 9, 10, and 11 employees of the defendants trading as Drucker Falk? In any event, list, by name and home address, each person who holds any of the positions mentioned in defendants' answers to interrogatories 9, 10, and 11.

19. List all the business activities in which the defendants, trading as Drucker & Falk, are and since January 1, 1966, have been engaged.

Roger T. Williams
Assistant U. S. Attorney

Sylvia S. Ellison
Chief Trial Attorney

William H. Horkan
Deputy Chief Trial Attorney

Thomas E. Korson
Attorney

(Caption Omitted)

PLAINTIFF'S REQUESTS FOR ADMISSIONS

(Filed in U. S. District Court July 23, 1969)

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, plaintiff requests that, within 10 days hereof, defendants admit, in writing and under oath, the truth of the following statements, which are continuing in nature and which, unless otherwise specified, pertain to the period since January 30, 1967.

1. With respect to defendants' management of the buildings listed in defendants' answer to interrogatory 1 (and to the defendants' management of any other building), the defendants, trading as Drucker & Falk, and not the owners of the buildings, perform the following functions:

(a) advertising for tenants to occupy the buildings

(b) hiring the employees who work at the buildings

(c) firing the employees who work at the buildings

(d) supervising the employees who work at the buildings

(e) renting the apartments in the buildings

(f) collecting the rent from the tenants

(g) making repairs at the buildings

(h) arranging with persons (other than the owners of the building) to have repairs made at the buildings

(i) payment of utility bills for the buildings

(j) payment of mortgage payments where applicable.

If any of the items listed above are performed or paid for

by the defendants trading as Drucker & Falk as agent for the owner of the building, please so indicate with respect to each item.

2. Defendants regularly deal with the following insurance companies, whose main offices are located in the locations indicated:

(a) American Casualty Company
Reading, Pennsylvania

(b) Kemper Insurance Company
Summit, New Jersey

(c) Central Mutual Insurance Company
Van Wert, Ohio

(d) Pawtucket Mutual Insurance Company
Pawtucket, Rhode Island

Please admit or deny with respect to each specific item above.

3. At defendants' office located at 131 - 26th Street, Newport News, Virginia, at least two employees are and since January 30, 1966 have been engaged, as a regular part of their duties each week, in handling, preparing, mailing, or otherwise working on insurance policies or other materials for transmission across state lines to each of the insurance companies mentioned in Request for Admissions 2. Please admit or deny with respect to each insurance company mentioned in Request for Admissions 2.

4. At Robin Hoods apartments (as identified in defendants' answer to interrogatory 1, part cc), the defendants, trading as Drucker & Falk, have collected rents in excess of one million dollars per year during the period since January 30, 1967.

5. Defendants, trading as Drucker & Falk, have, since January 30, 1967, considered their employees at Robin Hoods apartments to be covered by the provisions of the Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1961 (75 Stat. 65) and have, accordingly, compensated such employees at the rates prescribed by the Fair Labor Standards Amendments of 1961.

6. As a regular incident of their management of the buildings mentioned in defendants' answer to interrogatory 1 (and as a regular incident to defendants' management of any other building), defendants, trading as Drucker & Falk, repair (or cause to be repaired) parts for plumbing, heating, and airconditioning units.

7. The plumbing, heating, and airconditioning parts mentioned in Request for Admissions 6 are received by the defendants after the said parts have moved across state lines.

8. (a) In their newspaper advertisements for tenants to occupy apartment buildings which manage, the defendants mention their trade names but do not mention the name of the owner or owners of the apartment building.

(b) This practice has been in effect during the period since January 30, 1967.

Roger T. Williams
Assistant U. S. Attorney

Sylvia S. Ellison
Chief Trial Attorney

William H. Horkan
Deputy Chief Trial Attorney

Thomas E. Korson
Attorney

(Caption Omitted)

ANSWER TO PLAINTIFF'S INTERROGATORIES

(SECOND SET)

(Filed in U. S. District Court August 20, 1969)

This day come the defendants, E. E. Falk, A. L. Drucker, E. B. Drucker, David Falk and R. E. Smith, individually and as partners in Drucker & Falk, and file this, their individual and collective Answer to Plaintiff's Interrogatories (Second Set), as follows:

14. The answers listed in Interrogatories #1 did list rentals managed during period since January, 1967.

15. Correspondence mentioned in Interrogatories #4 did not go across state lines except where there be out-of-state ownership as previously referred to and there, operating statements once per month and frequent occupancy reports did go to owners.

16. In answer to Interrogatories #16 the telephone communications would be approximately once per month normally by the manager of the project.

17. To completely answer this question would take an enormous amount of research and then probably would not completely answer same; however, major suppliers are as follows:

Paint—Hampton Paint Company, Patterson Ave., Hampton, Va. C. A. Nash, 732 Granby Street, Norfolk, Va.

Plumbing & Heating Supplies—Noland Company, 2600 Warwick Boulevard, Newport News, Virginia

Fuel—Humble Oil Company, Terminal Avenue, Newport News, Virginia, Virginia Electric & Power Co., G. Street, Newport News, Virginia

Carpentry Supplies—R. F. Slaughter Lumber Company, 50 N. Mallory, Hampton, Virginia

18. The personnel mentioned in Interrogatories 9, 10 and 11 are not trading as Drucker & Falk, and their names and addresses are as shown on the attached list.

19. Drucker & Falk since January 1966 has been engaged in real estate brokerage, subdivision development, real estate management and insurance business.

ANSWERS TO REQUESTS FOR ADMISSIONS

This day came the defendants and file this, their answers to Request for Admissions, and in answer do say as follows:

1. That they do deny that Drucker & Falk as such perform all of the activities set forth in paragraph 1 in Request for Admissions and do aver that much of this work is perform by employees located on the project, hired by Drucker & Falk as agents for owners and for the owners' account or by persons previously hired by them as Agent for the Owners' account. All such employees are employees of the individual project.

2. That they do admit the statement contained in paragraph 2.

3. That they do admit allegations of paragraph 3.

4. That they do admit that Robinhood Apartments does collect its rent as stated but such rents are collected by employees of the apartments who are employees of the owners of subject apartment project.

5. Statement contained in Request for Admissions 5 is correct except such employees are employees of the project.

6. Statement contained in request for Admission 6 is incorrect.

7. Defendants are not aware of the source of equipment or parts mentioned in request for Admission 7.

8. Request for Admission 8(A) is incorrect since the name of the apartment project advertised is normally the name of the project.

E. E. Falk, A. L. Drucker, E. B. Drucker, David Falk and R. E. Smith, individually and as partners in Drucker & Falk

E. E. Falk
A. L. Drucker
E. B. Drucker
David Falk
R. E. Smith

Executive Director—Management Dept. — Richard E. Smith
14 Garland Court
Newport News, Va. 23606

Asst. Executive Director—Mgmt. Dept. — Jarvis W. Edwards
3406 Custer Court
Hampton, Va. 23366

Andover—Area Manager — G. C. Wood
5412 Princess Anne Road
Virginia Beach, Va. 23462

Maintenance Supt. — Frank Caprio
2517 E. Little Creek Road
Norfolk, Va. 23518

Armstrong—Area Manager — Mrs. Christine Hill
29 Lancaster Terrace
Hampton, Va. 23366

Maintenance Supt. — T. J. Lane
16 Robert Bruce Road
Poquoson, Va.

Bel Meade—Area Manager — F. O. Keil
1908 Seddon Road
Richmond, Va. 23227

Maintenance Supt. — Harry M. Let, Sr.
2402 Yorktown Avenue
Richmond, Va. 23234

Bolling—Project Manager — R. O. Osmond
520 Biltmore Road
Norfolk, Va. 23505

Maintenance Supt. — Thompson Sellers
9569 - 20th Bay Street
Norfolk, Va. 23518

Bondale—Area Manager — G. C. Wood
5412 Princess Anne Road
Virginia Beach, Va. 23462

Maintenance Supt. — A. L. Paolilli
2500 Wyoming Avenue
Norfolk, Va. 23513

Chamberlayne—Area Manager — F. O. Keil
1908 Seddon Road
Richmond, Virginia 23227

Maintenance Supt. — C. K. Topp
4308 Old Broad Road
Apt. #2
Richmond, Virginia 23227

Chesapeake—Area Manager — Mrs. Christine Hill
29 Lancaster Terrace
Hampton, Virginia 23366

Maintenance Supt. — James Young
618 Dallas Court
Hampton, Virginia 23369

Dresden Arms—Area Manager — Jacob Drucker
78-D Elizabeth Road
Hampton, Virginia 23369

Maintenance Supt. — R. Fitzgerald
1209 Tyler Avenue
Newport News, Va. 23601

Lakeshore—Area Manager — Larry W. Trent
University Apts. #45
(No Longer Manager by D & F) Greenwood Drive
Johnson City, Tennessee

Maintenance Supt. — Roscoe Gardner
36 Twin Lakes Drive
Hampton, Virginia 23366

Peninsula—Area Manager — Mrs. Christine Hill
29 Lancaster Terrace
Hampton, Virginia 23366

Maintenance Supt. — T. J. Lane
16 Robert Bruce Road
Poquoson, Virginia

Pleasant Manor—Maintenance Supt. — W. A. Ross
980 N. King Street
Hampton, Virginia 23369

Presidential Apartments—Area Manager — Jacob Drucker
78-D Elizabeth Road
Hampton, Virginia 23369

Maintenance Supt. — R. McPherson
16 Penwood Drive
Hampton, Virginia 23366

Presidential Investment—Area Manager — Jacob Drucker
78-D Elizabeth Road
Hampton, Virginia 23369

Maintenance Supt. — R. McPherson
16 Pennwood Drive
Hampton, Virginia 23366

Southampton—Area Manager — Mrs. Christine Hill
29 Lancaster Terrace
Hampton, Virginia 23366

Maintenance Supt. — T. J. Lane
16 Robert Bruce Road
Poquoson, Virginia

Warwick Gardens—Project Manager — W. L. Edwards
128 Cambridge Place
Hampton, Virginia 23369

Maintenance Supt. — John Davis
5204 Arlington Avenue
Newport News, Va. 23605

Warwick Marshall—Project Manager — W. L. Edwards
128 Cambridge Place
Hampton, Virginia 23369

Maintenance Supt. — John Davis
5204 Arlington Avenue
Newport News, Va. 23605

Executive Suite—None

Ivy-Dresden—Area Manager — Jacob Drucker
78-D Elizabeth Road
Hampton, Virginia 23369

Maintenance Supt. — R. Fitzgerald
1209 Tyler Avenue
Newport News, Va. 23601

Mercury West—Maintenance Supt. — Paul Sutherland
1601 Pennwood Drive
Apt. C
Hampton, Va. 23366

Hampton Associates—Area Manager — Larry W. Trent
University Apts. #45
Greenwood Drive
Johnson City, Tennessee

(No Longer Managed by D & F)

Maintenance Supt. — Roscoe Gardner
36 Twin Lakes Drive
Hampton, Virginia 23366

Glenwood—Area Manager — F. O. Keil
1908 Seddon Road
Richmond, Virginia 23227

Maintenance Supt. — Fred Johnson
Rt. #2, Box A39
Dunnsville, Virginia

Sewell—Area Manager — G. C. Wood
5412 Princess Anne Road
Virginia Beach, Va. 23462

Maintenance Supt. — A. L. Paolilli
2500 Wyoming Avenue
Norfolk, Va. 23513

Lakeshore Village—Area Manager — Larry W. Trent
University Apts. #45
(No Longer Managed by D & F) Greenwood Drive
Johnson City, Tennessee

Maintenance Supt. — Roscoe Gardner
36 Twin Lakes Drive
Hampton, Virginia 23366

Shell Gardens—None

Queen's Terrace—Area Manager — Larry W. Trent
University Apts. #45
(No Longer Managed by D & F) Greenwood Drive
Johnson City, Tennessee

Maintenance Supt. — William Palmer
188 Michigan Drive
Hampton, Virginia

West County—Area Manager — Mrs. Christine Hill
29 Lancaster Terrace
Hampton, Virginia 23366

Maintenance Supt.—None

Plaza—Area Manager — G. C. Wood
5412 Princess Anne Road
Virginia Beach, Va. 23462

Project Manager — B. W. Scott
124 #3 Palm Beach Place
Virginia Beach, Va. 23452

Maintenance Supt. — Robert L. Tyler, Sr.
169 Dillon Drive, Apt. #3
Virginia Beach, Va. 23452

Newsome—Project Manager — W. L. Edwards
128 Cambridge Place
Hampton, Virginia 23369

Maintenance Supt.—None

Robin Hood—Project Manager — R. Maurer
5527 Robin Hood Road
Norfolk, Va. 23513

Maintenance Supt. — Lewis Griffith
5424 W. Robin Hood Road
Norfolk, Va. 23513

NOTE: Area Managers, Executive Director and Asst. Executive Director are all Drucker & Falk Employees.

ORDER ON FINAL PRE-TRIAL CONFERENCE

(Filed in U. S. District Court September 12, 1969)

In conformity with the Local Rules of this Court relating to pre-trial procedure, it is Ordered that:

1. The parties hereto agree upon a stipulation with respect to certain undisputed facts as follows:

a. This Court's jurisdiction of this action under section 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 217) (hereinafter referred to as the Act) is not disputed.

b. Defendants have been since August 26, 1966, and are now actively engaged in the control and supervision of the operations of Drucker & Falk, 131 - 26th Street, Newport News, Virginia, in the business of selling real estate and insurance and managing rental property.

c. Defendants, at all times since August 25, 1966, have acted directly and indirectly in the interest of Drucker & Falk in relation to its employees.

d. At all times since August 25, 1966, at least two of defendants' employees at their main office at 131 - 26th Street, Newport News, Virginia, have been engaged in handling, preparing, mailing, or otherwise working on insurance policies or other materials for transmission across state lines to each of the following insurance companies: American Casualty Company, Reading, Pennsylvania; Kemper Insurance Company, Summit, New Jersey; Central Mutual Insurance Company, Van Wert, Ohio; and Pawtucket Mutual Insurance Company, Pawtucket, Rhode Island.

e. As a regular incident of their management of rental property, employees at the buildings managed by defendants repair plumbing, heating, and air conditioning units.

f. Substantial portions of the materials mentioned in (e) above moved across state lines.

g. Defendants manage and since August 25, 1966, have managed (among other buildings) the Robin Hood Apartments, 5500 Robin Hood Road, Norfolk, Virginia; the Plaza Apartments, 124 Palm Beach Place, Virginia Beach, Virginia; and the Sewell, 400 West Little Creek Road, Norfolk, Virginia.

h. At least one of the employees at each of the buildings specified in (g) above are and since August 25, 1966, has been regularly engaged in telephone and mail communications across state lines concerning the operation of the buildings with the owners of the buildings.

i. For the period since the first quarter of 1966, the gross receipts for rentals and other fees or charges collected by employees in the buildings from the tenants of the various buildings which defendants manage has been in excess of $1,000,000 each year.

j. The rents collected from the tenants of Robin Hood Apartments have been in excess of $1,000,000 per year during the period since January 30, 1967.

k. Defendants have considered the employees at Robin Hood Apartments, 5500 Robin Hood Road, Norfolk, Virginia, to be covered by the provisions of the Fair Labor Standards Act of 1938, as

amended by the Fair Labor Standards Amendments of 1961 (75 Stat. 65) and have accordingly compensated such employees at the rates prescribed by those amendments.

l. With respect to defendants' management of rental property, defendants perform the following functions:

(a) Hiring project manager at project.
(2) Firing project manager at project.
(3) Indirectly supervising the employees who work at the buildings.
(4) Advertising for tenants to occupy the buildings.
(5) Making payments of utility bills for the buildings out of project owner's account.
(6) Making mortgage payments where applicable out of project owner's account.

m. (omitted)

n. P/T Ex. #3 is a newspaper advertisement for apartment buildings managed by defendants. This advertisement is typical of defendants' advertising for tenants at the buildings which they manage.

o. The apartment projects belong to parties other than the defendants and are managed under a management contract which provides that employees of the project shall be employees of the owners and rental payments as received are deposited in an in and out account on behalf of the owner and expenses are paid out of this account with the balance distributed immediately after receipt. Ownership remains with the owner and not the defendants and contractual arrangement is one of owner and rental

agent. Employees are credited on defendants' books as employees of the particular project with each project having a project manager and sufficient other employees to handle rental, collections and repair work except contract repair work.

p. Employees at each building perform the following functions under the direction of the project manager:

(1) Renting the apartments in the building.
(2) Collecting the rents from the tenants.
(3) Making repairs at the buildings.
(4) Arranging with persons, other than the owners of the buildings, to have repairs made at the buildings.

2. (a) The parties hereto agree that the following exhibits, identified by the initials of counsel, may be introduced in evidence without the necessity of further proof:

P/T Ex. #1 Plaintiff's Discovery and Answers.
P/T Ex. #2 Schedule of back wages.
P/T Ex. #3 Advertisement.

(b) Defendant's Exhibit #1 will be copy of typical management contract.

3. (omitted)

4. (a) The factual contention of the plaintiff is that the employees at the buildings managed by defendants are employees of defendants.

(b) The factual contention of the defendant is that the projects managed by the defendant are owned by a multitude of parties who are unrelated to one another and that the employees are employees of the particular project car-

ried on their payrolls and paid by them out of their trust funds. Management of the apartment projects varies and the employees go with the managed apartments. Employees are handled as employees of the apartment owners. Payrolls, etc., are so handled. Relationship of the employees is as employees of the project owner.

5. (a) The triable issues as contended by the plaintiff are:

(1) Whether the activities of the defendants in selling real estate and insurance and managing rental property constitute an enterprise within the meaning of section 3(r) of the Act.

(2) Whether defendants' business activities constitute an enterprise engaged in commerce or in the production of goods for commerce within the meaning of section 3(s)(1) of the Act, as amended by the Fair Labor Standards Amendments of 1966 (80 Stat. 830).

(3) Whether the employees at the buildings managed by defendants are defendants' employees within the meaning of sections 3(d), (e), and (g) of the Act.

(4) Whether plaintiff is entitled to an order restraining the further withholding of back wages due to their employees under the Act.

(5) Whether plaintiff is entitled to prejudgment interest on the sums which defendants withheld as unpaid minimum wages and overtime compensation from their employees.

(b) The triable issues as contended by the defendant are:

(1) Whether Drucker & Falk is an enterprise as defined by the 1961 amendments to the Act or by the 1966 amendments to the Act.

(2) Whether Drucker & Falk is engaged in commerce or in the production of goods for commerce within the meaning of those terms as defined by the Fair Labor Standards Act.

(3) Whether the defendant Drucker & Falk is an "employer" of the "building employees" at the various apartment projects within the meaning of the Act.

(4) Whether the "annual gross volume of sales made or business done" by Drucker & Falk for its management activities is measured by gross rentals or by commissions received.

(5) Whether the plaintiff is entitled to the injunctive relief requested and/or interest thereon.

Pre-Trial Exhibit #2

The following sheets contain a schedule of back wages computed for the period from January 30, 1967 to January 30, 1969. The total back wages amount to $27,286.44.

(list of names, addresses, period covered, and amounts due—omitted)

App. 38

Pre-Trial Exhibit #3
Reprint from Newport News Daily Press,
May 2, 1968

THAT'S US ALL OVER

(Map Omitted)

SOUTHHAMPTON APARTMENTS

1 Bedroom Apt.
$74 and $77

2 Bedroom Apt.
$80 and $85

- Heat and Hot Water
- Swimming Pool

3816 Kecoughtan Road

9-5 Mon. Thru Sat.

Phone PA 2-6363

LAKESHORE APARTMENTS

TOWNHOUSE AND GARDEN APARTMENTS

The Address of the Peninsula's Most Fashionable People

- Townhouse Privacy
- Swimming Pool
- Hospitality House
- Dishwashers
- Nursery
- Individually Controlled Air Conditioning

(All Utilities Included)

DIRECTIONS: Drive out Mercury Blvd. to Todds Lane. Turn north to Lakeshore Village. HOURS: Daily 11 a.m.-5 p.m. Sunday, 1 p.m. 5 p.m. Anytime by appointment. 838-0323.

(Caption Omitted)

STIPULATION OF FACTS

(Filed in U. S. District Court October 9, 1969)

The parties stipulate that:

1. This stipulation supplements and clarifies the stipulation of undisputed facts contained in the order on final pretrial conference entered on September 5, 1969. Both stipulations may be introduced in evidence in this action.

2. Drucker & Falk, defendants, is a partnership engaged in the real estate and insurance business and, as part of its function, manages apartment projects for a commission of rentals. As such, Drucker & Falk manages approximately 30 projects and does so under agency contracts, sample copy of which is part of the Exhibits in this matter.

(a) The agency contract employs the defendants to manage the projects and to either furnish services in and about renting, collecting rents and managing the properties of the owner or, in the alternative, for the defendants to furnish only supervision of these activities, with the owners bearing all expense for on site clerical and leasing personnel. In either case in every instance it is specifically agreed in the contract that management does not include the expense of operating and maintaining the property and the agreement specifically provides that all such employees dealing with operating and maintaining the property shall be the employees of the owner. The plaintiff contends, and defendants deny, that the employees are in fact employees of the defendants within the meaning of Section 3(d), (e) and (g) of the Fair Labor Standards Act.

(i) Breakdown where services or supervision is furnished is shown on Appendix A.

2(b) The defendants feel their function is to advise the owners as to its recommendations to establish the major policy decisions by which the project is to be operated and to thereby establish the long range maintenance, modernization and major replacement programs which are designed over a period of years to insure that the project maintains its competitive position so as to prolong life of the project at its highest and best use, producing the highest reasonable stabilized net cash flow from the property to the owner.

2(c) All rental receipts are collected for the owners and deposited in a trust account separate from the defendants' personal account. Such accounts may be and are comingled in one trust account maintained by agent for all clients or properties managed by the defendants.

2(d) The agent renders monthly or at agreed times statements of receipts, expenses and charges and remits receipts less disbursements to the owners. In the event that disbursements are in excess of rents collected by the agent, owners are required to pay to agent such excess amount.

2(e) Defendants in their agreement with owners agree to supervise advertising and to rent and collect rents or to supervise these functions, and to stand in the shoes of the owner in this connection.

2(f) In connection with repairs, maintenance, and alterations, defendants have agreed to supervise such and have in this connection agreed to submit for approval a written budget for stipulated periods and no expenditures may be made under such budget except with specific approval of the owner. Such approval covers all cost of maintenance and repair, including wage costs.

2(g) For such services, and, where specified, for the use of defendants' employees in rental and clerical services, the

project owner pays a specific percentage of the rental on the income of the project. The arrangement between the parties is for a specific period, not less than one year, with the right for either party to terminate the relationship. There is no relationship of contract period between any one of the projects and another.

2(h) In each instance the repair and maintenance employees are carried on the books of the project owner as employees of the project owner and the project owner carries a separate employer identification number for income tax purposes.

2(i) The annual gross income of the individual projects in which employees in question are employed is not sufficient to bring such employees within the enterprise provisions of the Act until February 1, 1969.

2(j) Maintenance employees employed at projects may work on goods passing through interstate commerce but the specific employees doing such work or the amount thereof or frequency thereof is not known and would not bring the employees within the coverage of the Act except should they be considered employees of Drucker & Falk under the enterprise theory.

3. Although there are some minor variations from project to project, defendants' practice in managing the apartment projects is as follows:

3(a) The defendants differentiate between the management and rental function and the function of maintenance and upkeep of the apartment projects. Management and rental employees are, where specified, carried on the payroll of the defendants, whereas, maintenance and upkeep employees are in all cases carried as employees of the project owners.

3(b) The defendants in their real estate business have a management department charged with managing apartments which department is headed by one of the defendants as Executive Director of the Management Department. Under him, all on Drucker & Falk's payroll and not involved in this suit, are an Assistant Director and six Area Managers who are responsible for supervising and enforcing management policies at a number of projects normally within a given area. One of these individuals supervises only one project, but he is on a semi-retired basis.

3(c) Where so specified, rental agents and various clerical employees, carried on defendants' central payroll, work on the premises of the projects, collect rents, operate the rental office, take tenant complaints and keep the office records. These employees at each project deposit the rent and other receipts collected for the project in a customers account under the name of Drucker & Falk as agent in the bank closest to that location. Subsequently, these funds are withdrawn and deposited in a central customers trust account for all managed properties maintained at Citizens and Marine/United Virginia Bank, in the name of Drucker & Falk as Agents and designated as a customers account. The first mentioned account generally has a number and/or name which identifies the specific project. These employees send the collection information, bank deposit receipts and other records to defendants' central office. They are hired, fired and directly supervised by officials of defendants.

3(d) Each apartment project has a person in charge who is called "Project Manager" or "Maintenance Superintendent", depending upon the size of the project. These individuals are directly responsible for the maintenance and upkeep of the project and are directly supervised by the Area Manager or other officers of the defendants as agents for the project owner, and salaries for these individuals are

set in accordance with semi-annual budget which is approved by the project owner.

The Project Manager, or Maintenance Superintendent, is a person who has the capacity to make normal day-to-day decisions and to do the day-to-day physical operation, maintenance, repair and upkeep of the project. He is expected to make appropriate decisions as to the necessity for painting, redecorating and the extent of repair or replacement of damaged equipment.

The average pay of the Project Manager is $125 per week with apartment and utilities furnished in addition to the weekly salary. He is in charge of each project and hires, fires and supervises the maintenance employees of the project. The Project Manager or Maintenance Superintendent is carried as an employee of the project owner as well as the employees supervised by him. The Maintenance Superintendent keeps the records of hours worked each week by the maintenance employees and submits the records directly to defendants central office where the payroll for the project is made up for the account of each owner. The maintenance superintendent and maintenance employees of the project are paid by defendants' checks which are prepared by defendants' central office employees and signed by one of the defendants acting on behalf of their principals. The checks are drawn on a special payroll bank account kept by the defendants for all projects. The funds in this special payroll account are drawn from a central management customers account covering all projects in the amount required to meet the overall payroll, with each project owner being charged his exact payroll amount. The funds in this central customers account are the rents and other receipts which the rental agent deposits in the account as described in section (c) of this paragraph.

3. (e) The Project Manager or Maintenance Superintendent submits a semi-annual budget request to the Area Manager and higher supervisory officials in defendants' organization. Defendants' officials review and revise the budget and present it, with their recommendation, to the project owner for approval. The maintenance superintendent does not normally discuss the formal budget with the owner. However, the owner normally inspects the property on at least a semi-annual basis and discusses the project needs with the maintenance superintendent. This inspection is normally conducted just prior to the presentation of the budget request for the following period. The budget as it is approved by the owner is sent to the maintenance superintendent by the Area Manager or other Drucker & Falk officials. Generally, the budget places specific allowances for maintenance costs such as payroll, painting, grounds maintenance, plumbing, equipment repair, appliance replacement, etc. Within the limits of the budget the superintendent sets the hours of work and wage rates of the maintenance employees. The Area Managers and higher supervisory officials in defendants' organization have but rarely exercise a veto over the decision of the superintendents with respect to hiring, firing and setting wage rates. The superintendents are fairly autonomous because of their demonstrated good judgment and performance.

3. (f) Each maintenance superintendent receives bills for goods and services which he orders for the project and he sends the bills to defendants' central office with a voucher requesting payment. Defendants' central office employees pay the bills by checks drawn on the central customers account described in section (c) of this paragraph. The checks are signed by one of the defendants.

4. (a) The owners of the projects inspect their projects from time to time. Some of the owners inspect the projects

once a month; other owners inspect their projects twice a year, generally in advance of budget consideration. When they visit the projects, the owners are primarily concerned with the physical condition of the premises, vacancies, and tenant complaints. They do not make suggestions to the employees at the project with respect to the wages, hours or supervision of the maintenance employees; such suggestions are made as a matter of policy directly to their agents, the defendants.

4. (b) The maintenance superintendents are in a position to know, but may not know, who the owners of the project are. Most of the maintenance superintendents know who the owners are and know that their wages are ultimately paid by the owner out of rents for the project. While they may talk to the owners occasionally about the project, the superintendents look to the defendants for supervision and direction.

4. (c) Over a period of the last six or seven years, there have been a maximum of five maintenance personnel assigned by the defendants from one project to another project owned by an entirely different owner. In each instance this was moving a maintenance employee to a maintenance superintendent job or moving a maintenance superintendent to a larger project. In all cases, this was accomplished with the knowledge of the owners. Such transfers were arranged by officials of the defendants.

4. (d) Over the last five years, defendants have lost the agency contract at 8 projects belonging to various owners employing approximately 35 people. Of this total, defendants offered a job to two persons employed by these projects. Neither of these employees came with the defendants and in each instance the employees continued working at the project and were employed by the owners.

5. (a) Most projects managed by the defendants have an office, storage area, or other central facility from which the project is managed. Some of the smaller projects do not have such facilities. The maintenance work at these smaller projects is performed by employees and equipment from other projects managed by defendants. The use of these employees is only after approval of the owner of both projects and the smaller project is charged with the labor, which is credited to the larger project. The larger project normally agrees because of the economic advantage of being able to employ a half employee when a full time employee is not needed.

5. (b) Some of the maintenance superintendents and employees are carried on two separate payrolls of projects owned by entirely different owners where the projects are located in close geographic proximity and where the maintenance services to be rendered have identical objectives for both owners in order to permit economy of operation. In all instances, this is accomplished with the approval of both owners. Where the project owner has its own separate maintenance crew but shares the services of one or two employees, these shared employees receive two separate checks, one from each project account. In other instances, where there is one or more large project and one or more small project which do not have an independent maintenance crew, the maintenance personnel are carried by the larger project and provide maintenance service to the smaller project; in this instance, the shared employees are paid by one check from one account and the defendants maintain an internal accounting procedure so that the other project may be charged with that part of the employees' wages utilized by the smaller project.

5. (c) Except in the cases provided in section (b) above, all employees work solely at the project where they are employed.

6. Some of the projects where the employees involved are employed are no longer managed by the defendants.

7. None of the projects managed by defendants except Robin Hood had a total rental income in excess of the $1,000,000 annual figure set by Congress as criteria for being an enterprise engaged in commerce or in the production of goods for commerce. In this instance, the employees of the project were paid rates in accordance with the Fair Labor Standards Act. Some of the projects managed by the defendants have total rental income in excess of $250,000. Defendants have agreed to pay employees in those projects in accordance with the Act beginning February 1, 1969, the date on which the dollar volume test was reduced to $250,000 under Section 3(s)(1) of the Act.

8. For a period of approximately one year prior to the enactment of the 1966 amendments to the Fair Labor Standards Act in September 1966, the Department of Labor did not take vigorous action to enforce the Act with respect to the activities of apartment house management companies. This absence of action was due to a thorough study of the applicability of the enterprise provisions of the Act to those activities. Some investigations were made during the period but no enforcement action was instituted in court. Subsequent to the enactment of the 1966 amendments, the Department re-asserted its position that the activities came within the enterprise provisions of the Act and began scheduling investigations in a concerted enforcement effort shortly after February 1, 1967, the effective date of the 1966 amendments. The investigation that lead to this law suit was started on August 26, 1968. At the final conference on

October 22, 1968, E. E. Falk, one of the defendants and a partner of the other defendants, told Mr. Earl Hawthorne, the Wage-Hour Investigator that he was aware of the Department's position that all of the apartment projects managed by the defendants comprised one enterprise and that all employees in the projects were covered by the enterprise provisions of the Act. Mr. Falk stated, however, that defendants contested the Department's position and had contributed a substantial sum of money to the National Association of Real Estate Board to help in the defense of *Wirtz* v. *Arnheim & Neeley, Inc.*, a similar case brought by the Secretary of Labor in Pittsburgh, Pennsylvania. That suit was filed in October, 1967. On instruction from the Association, Mr. Falk refused to make any settlement or concessions on the enterprise issue. He agreed to comply with respect to employees in those projects which were considered enterprises standing alone.

JONES, BLECHMAN,
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Attorney

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United States Department of Labor

Of Counsel

BRIAN P. GETTINGS
United States Attorney

APPENDIX A

	1966	1967	1968
Gross rental collected where rental employees furnished by Drucker & Faulk	$5,670,030.13	$6,170,728.41	$6,026,908.97
Gross rental collected where rental employees furnished by Owner	$ 141,589.24	$1,554,872.45	$2,580,177.07

Projects where leasing personnel on Owner's payroll:

Plaza	Lakeshore Village
Robin Hood	Victory Gardens
Lakeshore Association	Newsome I and II
Hampton Association	

Management Agreements used for two methods of rentals are attached as Exhibits A and B.

"Exhibit A"

MANAGEMENT AGREEMENT

.....:

Agreement made this ..... day of ....., 19.... between .....; .....; .....; .....; all hereinafter designated as "Owners", and Drucker & Falk, hereinafter designated "Agent".

Witnesseth:

In consideration of the mutual promises and covenants herein contained, Owners and Agent agree as follows:

ARTICLE I

Owners hereby employ and appoint Agent as the sole and exclusive renting and management agent to rent, lease, operate, and manage the Owner's property known as ..... upon the terms hereinafter set forth.

ARTICLE II

(a) Agent accepts the employment and appointment and agrees to use due diligence in the management of the premises upon the terms herein provided, and agrees to furnish the services of his organization for the establishment of marketing and operating policies, programs and procedures, the provision of accounting and budgetary services, and the provision of close supervision of the implementation of policies and programs established for the renting, leasing, collection of rents, and managing of Owner's property described herein. It is understood that except as provided in this Article, "management" does not include any expenses of advertising, marketing, renting, leasing, operating or maintaining the premises.

(b) Agent agrees to deposit all receipts collected for Owners in a Trust Account, separate from Agent's personal account. Such receipts may be co-mingled in one trust account maintained by Agent for all or several clients or properties managed by Agent. Agent agrees that upon special request of Owners, a separate rate trust account for subject property will be established and maintained. It is agreed that Agent will not be held liable in the event of bankruptcy or failure of any depository.

(c) Agent agrees to render monthly, or at such other reasonable intervals as Owners and Agent may agree upon, statements of receipts, expenses and charges, and to remit to

Owners receipts less disbursements. In the event that the disbursements shall be in excess of the rents collected by Agent, Owners agree to pay to Agent such excess promptly upon demand.

(d) Agent's employees who handle or are responsible for Owner's monies shall be bonded by a fidelity bond.

ARTICLE III

Agent agrees to provide the services of his organization to provide diligent and proper supervision of the execution of the following authority and powers which Owner hereby confers upon Agent, all expenses for which Owners agree to assume.

(a) To advertise the availability for rental of subject property or any part thereof and to display signs thereon; to sign, renew and/or cancel leases for the premises or any part thereof; to collect rents due or to become due and to issue receipts therefore; to terminate tenancies and to sign and serve in the name of Owners such notices as Agent deems needful; to institute and prosecute actions to evict tenants and recover possession of said premises; to sue for, in the name of OWNERS, and recover rents and other sums due; and, when expedient, to settle, compromise, and release such actions or suits or reinstate such tenancies. Any leases executed for the OWNER by the Agent shall not exceed one (1) year.

(b) To make or cause to be made and supervise repairs and alterations, and to do decorating on said premises, and to purchase supplies and pay all bills. In this connection, beginning ....., 19...., Agent will submit to Owners for their prior approval a written budget for stipulated periods as agreed upon. Agent agrees to secure the

approval of Owners on all expenditures in excess of ten (10) per cent over an approved budget, except that Agent is authorized to expend funds pending budget approval for monthly recurring operation expenses at a rate not in excess of that approved in the prior budget period. Agent is also authorized to expend funds for unbudgeted emergency repairs, if in the opinion of Agent such repairs are necessary to protect the property from damage or to maintain required services to tenants.

(c) Subject to budget approval as set forth in paragraph (b) above, to hire, discharge and supervise all labor and employees required for the operation and maintenance of the premises, with all employees deemed employees of Owners. Agent may perform any of his duties through Owner's attorneys, agents, and employees and shall not be responsible for their acts, defaults, or negligence if reasonable care has been exercised in their appointment and rentention.

(d) Subject to budget approval as set forth in paragraph (b) above, to make contracts for electricity, gas, fuel, water, telephone, window cleaning, ash or rubbish removal, decorating, repair, and other services or such of them as Agent shall deem advisable. Owners shall assume the obligation of any such contract entered into for their benefit, including any such obligation which may extend beyond any termination of this agreement.

ARTICLE IV

(a) Owners agree to hold and save Agent free and harmless from damages or injuries to person or property by reason of any cause whatsoever either in or about the premises or elsewhere arising out of Agent's management of subject property.

(b) Owners agree to carry public liability insurance with limits not less than $300,000 which policy(ies) shall be so written as to expressly name Agent as a co-insured, covering Agent in the same manner and to the same extent as Owners, memorandum copies of which shall be delivered to Agent. Owners shall carry adequate workmen's compensation insurance and such other insurance as may be necessary for the protection of the interest of Owners.

(c) Agent shall not be liable for any error of judgment or any mistake of fact or law; Agent shall be liable only for such actions or failure to act as constitute wilful misconduct or gross negligence.

(d) If Owners shall fail or refuse to comply with or abide by any rule, order, determination, ordinance, or law of any Federal, State or Municipal Authority, Agent upon giving twenty-four (24) hours written notice may terminate this Agreement.

ARTICLE V

Owners will advise Agent in the event Owners desire Agent to pay mortgage indebtedness, property or employee taxes, special assessments, or to place insurance and pay premiums upon fire, liability, steam boiler, pressure vessel, or any other insurance. As to any such payments to be made by the Agent, Agent is directed to accrue such sums on a monthly basis from the Owner's funds if necessary to assure sufficient funds on hand by the date payment becomes due and to pay same.

ARTICLE VI

Agent is clothed with such other general authority and powers as may be necessary or advisable to carry out the spirit and intent of this Agreement.

Owners agree to pay Agent monthly as compensation for his services, a management fee equal to four (4%) per cent upon all rents collected for said property, or such other rate as may be fixed from time to time for like services by the Newport News-Hampton Real Estate Board; provided however that any such rate increase shall go into effect only after expiration of thirty (30) days subsequent to the Agent notifying the Owners of his intention to place into effect such rate increases; and provide further that if such rate increase is unacceptable to Owners, and Agent is unwilling to continue management at the existing rate, Owners may terminate this agreement and Agency without penalty upon thirty (30) days notice to this effect to Agent.

ARTICLE VIII

(a) This agreement shall become effective when executed for an original term ending on the ..... day of ....., 19.....

(b) Thereafter, this contract shall be automatically renewed for periods of one year unless on or before sixty (60) days prior to the ..... day of ....., 19....., or on or before thirty (30) days prior to the expiration of any such renewal period, either party hereto shall notify the other in writing at the address hereinafter set forth of an intention to terminate this agreement, in which case this agreement may be terminated.

(c) Subject to the provisions of paragraph (d) in this Article, on or after ....., 19....., either party may terminate this agreement at any time without penalty upon giving thirty (30) days written notice.

(d) Should this agreement be terminated in any fashion by Owners during the original term (except in the case of

termination for wilful misconduct or gross negligence of Agent), Owners agree to pay the Agent as compensation for his past efforts, for a period of twelve (12) months following termination, that monthly sum which equals the amount which would have been the management fee except for such termination.

(e) Anything in this Article to the contrary notwithstanding, Owners may upon thirty (30) days notice terminate this agreement without penalty in the event of wilful misconduct or gross negligence of Agent in the management of said property. In the event of dispute as to the existence of wilful misconduct or gross negligence, the matter shall be submitted to arbitration. Owners and Agent shall each select an arbitrator, and a third shall be chosen by the two thus designated; and if they fail to select the third within ten (10 days after their selection, such third arbitrator shall be selected by the Judge of the Circuit Court of Newport News, Virginia. The arbitrators shall examine all relevant facts and reach a determination. A determination signed by any two arbitrators shall determine the dispute and shall be binding upon Owners and Agents. Costs of arbitration shall be borne by the party against whom the determination is made.

This Agreement shall be binding upon the parties hereto, the heirs, administrators, executors, successors and assigns of Owners, and the successors and assigns of Agent.

In Witness Whereof, the parties hereto have executed this Agreement, consisting of five (5) pages, and have affixed or caused to be affixed their respective signatures and have affixed their seals this ..... day of ....., 19.....

Drucker & Falk
131 - 26th Street
Newport News, Virginia

.....
.....
.....

By: .....(Seal)
Partner

.....(Seal)

.....(Seal)

"Exhibit B"

MANAGEMENT AGREEMENT

.....:

Agreement made this ..... day of ....., 19..... between ....., ..., ..., ..., all hereinafter designated as "Owners", and Drucker & Falk, hereinafter designated "Agent".

Witnesseth:

In consideration of the mutual promises and covenants herein contained, Owners and Agent agree as follows:

Article I

Owners hereby employ and appoint Agent as the sole and exclusive renting and management agent to rent, lease, operate, and manage the Owners property known as ..... upon the terms hereinafter set forth.

Article II

(a) Agent accepts the employment and appointment and agrees to use due diligence in the management of the premises upon the terms herein provided, and agrees to furnish the services of his organization for the renting, leasing, collection of rents, and managing of Owners property de-

scribed herein. It is understood that except as provided in this Article, "management" does not include any expenses of operating and maintaining the premises.

(b) Agent agrees to deposit all receipts collected for Owners in a Trust Account, separate from Agent's personal account. Such receipts may be co-mingled in one trust account maintained by Agent for all or several clients or properties managed by Agent. Agent agrees that upon special request of Owners, a separate trust account for subject property will be established and maintained. It is agreed that Agent will not be held liable in the event of bankruptcy or failure of any depository.

(c) Agent agrees to render monthly, or at such other reasonable intervals as Owners and Agent may agree upon, statements of receipts, expenses and charges, and to remit to Owners receipts less disbursements. In the event that the disbursements shall be in excess of the rents collected by Agent, Owners agree to pay to Agent such excess promptly. upon demand.

(d) Agents employees who handle or are responsible for Owners' monies shall be bonded by a fidelity bond.

(e) Agent agrees to contribute toward actual annual expenditure for advertising a sum not to exceed ten (10) per cent of the management fee received in that year.

Article III

Agent agrees to provide the services of his organization to provide diligent and proper supervision of the execution of the following authority and powers which Owner hereby confers upon Agent, all expenses for which Owners agree to assume (except as provided in Article II (e) with regard to advertising):

(a) To advertise the availability for rental of subject property for any part thereof and to display signs thereon; to sign, renew and/or cancel leases for the premises or any part thereof; to collect rents due or to become due and to issue receipts therefore; to terminate tenancies and to sign and serve in the name of Owners such notices as Agent deems needful; to institute and prosecute actions to evict tenants and recover possession of said premises; to sue for, in the name of Owners, and recover rents and other sums due; and, when expedient, to settle, compromise, and release such actions or suits or reinstate such tenancies. Any leases executed for the Owner by the Agent shall not exceed one (1) year.

(b) To make or cause to be made and supervise repairs and alterations, and to do decorating on said premises, and to purchase supplies and pay all bills. In this connection, Agent shall submit to Owners for their prior approval a written budget for stipulated periods as agreed upon. Agent agrees to secure the approval of Owners on all expenditures in excess of ten (10) per cent over an approved budget, except that Agent is authorized to expend funds pending budget approval for monthly recurring operation expenses at a rate not in excess of that approved in the prior budget period. Agent is also authorized to expend funds for unbudgeted emergency repairs, if in the opinion of Agent such repairs are necessary to protect the property from damage or to maintain required services to tenants.

(c) Subject to budget approval as set forth in paragraph (b) above, to hire, discharge and supervise all labor and employees required for the operation and maintenance of the premises, with all employees deemed employees of Owners. Agent may perform any of his duties through Owners attorneys, agents, and employees and shall be responsible

for their acts, defaults, or negligence if reasonable care has been exercised in their appointment and retention.

(d) Subject to budget approval as set forth in paragraph (b) above, to make contracts for electricity, gas, fuel, water, telephone, window cleaning, ash or rubbish removal, decorating, repair, and other services or such of them as Agent shall deem advisable. Owners shall assume the obligation of any such contract entered into for their benefit, including any such obligation which may extend beyond any termination of this agreement.

Article IV

(a) Owners agree to hold and save Agent free and harmless from damages or injuries to person or property by reason of any cause whatsoever either in or about the premises or elsewhere arising out of Agent's management of subject property.

(b) Owners agree to carry public liability insurance with limits not less than $300,000 which policy(ies) shall be so written as to expressly name Agent as a co-insured, covering Agent in the same manner and to the same extent as Owners, memorandum copies of which shall be delivered to Agent. Owners shall carry adequate workmen's compensation insurance and such other insurance as may be necessary for the protection of the interest of Owners.

(c) Agent shall not be liable for any error of judgment or any mistake of fact or law; Agent shall be liable only for such actions or failure to act as constitutes willful misconduct or gross negligence.

(d) If Owners shall fail or refuse to comply with or abide by any rule, order, determination, ordinance, or law of any

Federal, State or Municipal Authority, Agent upon giving twenty-four (24) hours written notice may terminate this Agreement.

Article V

Owners will adivse Agent in the event Owners desire Agent to pay mortgage indebtedness, property or employee taxes, special assessments, or to place insurance and pay premiums upon fire, liability, steam boiler, pressure vessel, or any other insurance. As to any such payments to be made by the Agent, Agent is directed to accrue such sums on a monthly basis from the Owners funds if necessary to assure sufficient funds on hand by the date payment becomes due and to pay same.

Article VI

Agent is clothed with such other general authority and powers as may be necessary or advisable to carry out the spirit and intent of this Agreement.

Article VII

Owners agree to pay Agent monthly as compensation for his services, a management fee equal to six (6) per cent upon all rents collected for said property, or such other rate as may be fixed from time to time for like services by the Newport News-Hampton Real Estate Board; provided however that any such rate increase shall go into effect only after the expiration of thirty (30) days subsequent to the Agent notifying the Owners of his intention to place into effect such rate increases; and provide further that if such rate increases is unacceptable to Owners, and Agent is unwilling to continue management at the existing rate, Own-

ers may terminate this agreement and Agency without penalty upon thirty (30) days notice to this effect to Agent.

Article VIII

(a) This agreement shall become effective when executed for an original term ending on the ..... day of ....., 19....

(b) Thereafter, this contract shall be automatically renewed for periods of one year unless on or before sixty (60) days prior to the ..... day of ....., 19...., or on or before thirty (30) days prior to the expiration of any such renewal period, either party hereto shall notify the other in writing at the address hereinafter set forth of an intention to terminate this agreement, in which case this agreement may be terminated.

(c) Subject to the provisions of paragraph (d) in this Article, on or after ....., 19, either party may terminate this agreement at any time without penalty upon giving thirty (30) days written notice.

(d) Should this agreement be terminated in any fashion by Owners during the original term (except in the case of termination for willful misconduct or gross negligence of Agent), Owners agree to pay the Agent as compensation for his past efforts, for a period of twelve (12) months following termination, that monthly sum which equals the amount which would have been the management fee except for such termination.

(e) Anything in this Article to the contrary notwithstanding, Owners may upon thirty (30) days notice terminate this agreement without penalty in the event of willful misconduct or gross negligence of Agent in the management

of said property. In the event of dispute as to the existence of willful misconduct or gross negligence, the matter shall be submitted to arbitration. Owners and Agent shall each select an arbitrator, and a third shall be chosen by the two thus designated; and if they fail to select the third within ten (10) days after their selection, such third arbitrator shall be selected by the Judge of the Circuit Court of Newport News, Virginia. The arbitrators shall examine all relevant facts and reach a determination. A determination signed by any two arbitrators shall determine the dispute and shall be binding upon Owners and Agents. Costs of arbitration shall be borne by the party against whom the determination is made.

This Agreement shall be binding upon the parties hereto, the heirs, administrators, executors, successors and assigns of Owners, and the successors and assigns of Agent.

In Witness Whereof, the parties hereto have executed this Agreement, consisting of five (5) pages, and have affixed or caused to be affixed their respective signatures and have affixed their seals this ..... day of ....., 19....

Drucker & Falk
131 26th Street
Newport News, Virginia

.....
.....
.....

By: .....(Seal)
Partner

.....(Seal)

.....(Seal)

ORDER ALLOWING CERTIORARI

Supreme Court of the United States

October Term, 1972

No. 72-844

E. E. FALK, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK, ET ALS.,

Petitioners,

v.

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

February 26, 1973. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit granted limited to Questions 2 and 3 presented by the petition which read as follows:

"2. Under the Fair Labor Standards Act to be covered an enterprise must have an 'annual gross volume of sales made or business done' of $500,000. Is this figure to be measured by the gross rentals collected by the agent or by that agent's gross commissions?

"3. Are maintenance workers employed at the buildings managed by petitions employees of the apartment owner or of the petitioners?"

Supreme Court of the United States

October Term, 1972

No. 72-.....

E. E. FALK, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK,
A. L. DRUCKER, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK,
E. B. DRUCKER, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK,
DAVID C. FALK, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK, and
R. E. SMITH, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK,

Petitioners,

v.

GEORGE P. SHULTZ, SECRETARY OF LABOR (NOW JAMES D. HODGSON), UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS OF THE UNITED STATES

JONES, BLECHMAN, WOLTZ & KELLY
Franklin O. Blechman
Herbert V. Kelly
E. D. David
2600 Washington Avenue
Newport News, Virginia 23607
Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authority

Supreme Court of the United States

October Term, 1972

No. 72-.....

E. E. FALK, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK,
A. L. DRUCKER, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK,
E. B. DRUCKER, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK,
DAVID C. FALK, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK, and
R. E. SMITH, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK,

Petitioners

v.

GEORGE P. SHULTZ, SECRETARY OF LABOR (NOW JAMES D. HODGSON), UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS OF THE UNITED STATES

The petitioners, E. E. Falk, individually and as a partner in Drucker & Falk, et al., pray that a writ of certiorari issue to review the opinion and judgment of the Fourth Circuit

Court of Appeals of the United States rendered in these proceedings on September 11, 1972, as well as on March 3, 1971.

OPINIONS BELOW

Supreme Court. Certiorari was denied in *Falk* v. *Hodgson*, 404 U.S. 827 (1971) (App. C, *infra.*, p. 11).

Fourth Circuit. The first opinion of the Court of Appeals for the Fourth Circuit is reported at 439 F.2d 340 (4th Cir. 1971) (App. D, *infra.*, pp. 12-28), and the most recent opinion is not yet reported. (App. A, *infra.*, pp. 1-2).

District Court. The initial opinion of the United States District Court for the Eastern District of Virginia is reported in 312 F. Supp. 608 (E. D. Va. 1970) (App. E, *infra.*, pp. 29-40), and the second opinion is not reported. (App. B., *infra.*, pp. 3-10).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) to review the opinion and order of the Fourth Circuit Court of Appeals entered on March 3, 1971. September 11, 1972 and on

QUESTIONS PRESENTED

Your petitioners are rental agents for 30 independent rental unit complexes located in the Cities of Hampton, Newport News, Norfolk, and Richmond. The projects admittedly have no relationship one to the other except for the fact that they employ the same rental agents to care for the premises and collect the rents. It is also admitted that the owners of the apartment projects would not be covered by the Fair Labor Standards Act if they did not use the services of Drucker & Falk. Questions presented here relate to whether the petitioners are covered under the

enterprise amendments to the Fair Labor Standards Act. Those questions are:

1. Is a rental agent of various rental apartment projects, which have no relationship one to the other except a common rental agent, an enterprise within the meaning of the Fair Labor Standards Act? Phrased another way the question is whether an apartment owner, who is admittedly not covered by the Fair Labor Standards Act, comes within the Act's terms by the mere fact that the owner employs a rental agent who manages other rental apartments.

2. Under the Fair Labor Standards Act to be covered an enterprise must have an "annual gross volume of sales made or business done" of $500,000.[1] Is this figure to be measured by the gross rentals collected by the agent or by that agent's gross commissions?

3. Are maintenance workers employed at the buildings managed by petitioners employees of the apartment owner or of the petitioners?

4. Should the Court decide this matter for the Government, is prejudgment interest appropriate?

STATUTORY PROVISIONS INVOLVED

This case involves the provisions of the Fair Labor Standards Act, 29 U.S.C. 201, *et seq.*, as amended by the Fair Labor Standards Amendments of 1966, 80 Stat. 830, together with the language of Section 3(s)(3) as is read prior to the 1966 amendments (75 Stat. 65, 66) as are reprinted in pertinent part in App. F, *infra.*, pp. 41-44.

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[1] This is true for purposes of this litigation. Coverage now begins at $250,000.

CONCISE STATEMENT OF CASE

This action was instituted by the Secretary of Labor on January 30, 1969, under Section 17 of Fair Labor Standards Act of 1938, against the defendants who are partners in an apartment management firm called Drucker & Falk. The matter was submitted to the United States District Court for the Eastern District of Virginia on pretrial order and stipulation of facts. On January 16, 1970, The Honorable Richard B. Kellam handed down his decision dismissing the complaint, finding for the defendants on all issues. The Secretary appealed to the Fourth Circuit who, on March 3, 1971, reversed the District Court and remanded the case for further proceedings not inconsistent with the views expressed in its opinion. Writ of Certiorari was denied by this Court on October 12, 1971. On remand to the District Court, Drucker and Falk resisted the imposition of the judgment and the awarding of pre-judgment interest. The District Court found pre-judgment interest to be appropriate on July 28, 1971, which opinion was affirmed by the Fourth Circuit on September 11, 1972.

The activity of Drucker & Falk which is the catalyst for this case is its management of various apartment complexes within the State of Virginia. Drucker & Falk manages these apartments for various owners, the terms and obligations of that relationship being controlled by contract. Under this contract Drucker & Falk had two main obligations. The first was to lease and collect the rents for the apartment projects. As to this aspect the contracts varied in that they may call for Drucker & Falk to furnish the agents for this service and bear that cost or they may call for Drucker & Falk to merely supervise the personnel supplied by the owners, the owners bearing the cost. Where Drucker & Falk bore the cost of the clerical help, these employees

were paid at the appropriate overtime rate and consequently there is no dispute as to these employees. In the situation where the owners of the project paid the clerical help, the employees were not paid overtime.

The other main obligation of Drucker & Falk was to operate and maintain the property within the budget set by the owners, the entire cost to be borne by the owners. Since the employees were deemed to be those of the owners, they were not paid overtime.

It was this failure of the owners to pay overtime in the above situations which led to the institution of this suit against Drucker & Falk. Suit was not filed against the separate owners because it is admitted that the Fair Labor Standards Act did not reach to any one individual owner. The only way the employees of the various projects managed by Drucker & Falk could come under the Fair Labor Standards Act is by virtue of the government's theory, i.e., Drucker & Falk is the employer of the project employees *and* that Drucker & Falk is an enterprise engaged in commerce. Thus, what the government could not accomplish by coming into the front door, it sought to do by coming in the back door. The petitioners contend that there is no rear entrance for the government as far as their building is concerned.

To carry out its contractual management duties Drucker & Falk employs various management employees, including six area managers, and various clerical employees and rental agents, all of whom are admitted by petitioners to be their employees. Drucker & Falk carries out the day-to-day operations of each project through a maintenance superintendent or project manager who, under the supervision of the area manager, is in charge of each project, and who supervises the maintenance employees. The only element which ties

one apartment project to the other is the use of the same rental agent. As agent for the owner, Drucker & Falk works at his suffrage and at his direction.

As compensation for its services, the owners pay to Drucker & Falk a fixed percentage of the rentals collected. In no one apartment project managed by Drucker & Falk are the rentals greater than the statutory minimum, though if lumped together they are substantially in excess. Nor will the statutory minimum be met either by calculation of the individual commissions paid by each project to Drucker & Falk or by combining all those commissions together.

The District Court held that the employees in question were those of the owner, not Drucker & Falk; that the proper measure of business done was the gross commissions received; and that Drucker & Falk was not an enterprise. The Court of Appeals reversed each of these findings.

REASONS FOR GRANTING THE WRIT

The compelling reason for granting the writ in this case is that the Court has granted a writ in *Hodgson* v. *Arnheim and Neely, Inc., et al.*, No. 71-1598. The issue in *Arnheim and Neely*, and in this case, basically revolves around the interpretation to be given the enterprise amendments to the Fair Labor Standards Act. As the Secretary stated in his petition for a writ in the *Arnheim and Neely* case (No. 71-1598, memorandum for the Petitioner, pp. 7-8).

> This case and *Shultz* v. *Falk, supra,* are identical except for the immaterial fact that respondent's management activities are performed in connection with office buildings and an apartment complex, while those in *Falk* were performed in connection with apartment buildings only. Moreover, the precise contention accepted by the court below as the basis for its decision

—viz., that respondent's building management activities could not be treated as part of a single enterprise unless the interests of the building owners were also related—was rejected by the Fourth Circuit in *Falk*.

This case, as well as the *Arnheim and Neely* case, were test suits instituted by the Secretary of Labor about the same time. In this case, the Government was successful in the Fourth Circuit, whereas, it was unsuccessful in the Third Circuit decision of *Arnheim and Neely*. To resolve the divergent rulings of the Court below and of the Third Circuit in *Arnheim and Neely* is undoubtedly the reason this Court granted the Government's writ in *Arnheim and Neely*. If the writ is granted in this case, the opinions of the Fourth Circuit, as well as the Third, will be squarely before it, and thus, the Court will have the issues presented in the fullest possible manner.

If this writ is not granted, and the Court subsequently affirms the Third Circuit, a great injustice would be done to the petitioners. Drucker and Falk would then be faced with having to comply with the erroneous rulings of the Fourth Circuit when the law would clearly sustain their position.

The petitioners could also state at this point why this case should be heard on the merits. However, such an exposition is not necessary. The Court has already decided that the issues raised in this case are worthy of review since those issues are the same as in *Arnheim and Neely* and the facts of the two cases are almost identical. (See the petition for a writ of certiorari in the *Arnheim and Neely* case, No. 71-1598, and in *E. E. Falk, et als.* v. *James D. Hodgson*, No. 70-225).

The only new issue raised by the petitioners' writ is one concerning the awarding of prejudgment interest. Of course, this issue would not come into play if the peti-

tioners' position is sustained. If, however, the Secretary is successful, then the question of the awarding of prejudgment interest is important.

Basically, the petitioners' position is that with the making of new law, together with the fact that the petitioners did not have the use of the money and that the sum would be de minimis to the employee, the awarding of prejudgment interest is inequitable. In addition, your petitioners contend that Section 17 of the Fair Labor Standards Act will not allow the assessment of prejudgment interest. *Cf. Brooklyn Savings Bank* v. *O'Neill,* 324 U.S. 697 (1944); 2 *U.S. Code Cong. and Admin. News,* 1713, 87th Cong., 1st Sess. (1961).

The fact that this Court has once denied a writ to the petitioners would not affect the granting of a writ now and the subsequent review of all the issues raised in this case. *Mercer* v. *Theriot,* 377 U.S. 152, 12 L.ed 2d. 206, 84 S.Ct. 1157 (1964); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.,* 240 U.S. 251, 60 L.ed. 629, 36 S.Ct. 269 (1916). Cf. *Erie* v. *Thompson,* 337 U.S. 163, 93 L.ed. 1282, 69 S.Ct. 1018, 11 ALR 2d. 252 (1949); *Messenger* v. *Anderson,* 225 U.S. 436, 56 L.ed. 1152, 32 S.Ct. 739 (1912).

Since this application is timely, the cases cited above make it perfectly clear that the Court can now grant a writ and review issues raised on the first appeal.

CONCLUSION

With the granting of the writ in *Arnheim and Neely* to resolve the divergent views between the Third Circuit and the Fourth Circuit in this case, the Court has already concluded that the issues raised merit the review of this Court. If the petitioners' writ is denied, a great injustice could be done to them. With this case before the Court, along with

Arnheim and Neely, the fullest presentation of the issues and the divergence between the Third and Fourth Circuit will be possible. For these reasons, therefore, this petition should be granted.

Respectfully submitted,

JONES, BLECHMAN, WOLTZ & KELLY
F. O. Blechman
Herbert V. Kelly
E. D. David
2600 Washington Avenue
Newport News, Virginia 23607
Counsel for Petitioners

December 8, 1972

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1289

James D. Hodgson, Secretary of Labor,
United States Department of Labor,

Appellee,

versus

E. E. Falk, individually and as a partner in
Drucker & Falk, et als.,

Appellants.

Appeal from the United States District Court for the
Eastern District of Virginia, at Newport News.
Richard B. Kellam, District Judge.

Argued August 30, 1972. Decided September 11, 1972.

Before Haynsworth, Chief Judge and Craven and Russell,
Circuit Judges.

Per Curiam:

We find that the District Judge clearly recognized that the question of the allowance of pre-judgment interest was

one addressed to his discretion, and that we had affirmed its denial in another case arising under the Fair Labor Standards Act. *Mayhew* v. *Wirtz*, 4 Cir., 413 F.2d 658.

We find no abuse of discretion in the allowance of such interest in this case.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

Civil Action No. 12-69-NN

GEORGE P. SHULTZ, Secretary of Labor,
United States Department of Labor,
Plaintiff,

v.

E. E. FALK, Individually and as a partner in
Drucker & Falk, et als.,
Defendants.

OPINION

This suit was commenced January 30, 1969 by complaint of the Secretary of Labor against E. E. Falk and others, individually and as partners in Drucker & Falk. The defendants engaged in a real estate enterprise, were charged with failure to pay certain of their employees the minimum wage as set out in the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. Upon a stipulation of the facts, this Court found in favor of defendants. 312 F.Supp. 608. The government appealed. The United States Court of Appeals for the Fourth Circuit reversed and remanded for entry of a judgment. 439 F.2d 340. The government now contends that the award to employees of Falk on whose behalf it sued should carry interest at the rate of 6% per annum running from the median date of each employee's period of employ-

ment. The issue of pre-judgment interest was before the United States Court of Appeals for the Fourth Circuit in *Mayhew* v. *Wirtz*, 413 F.2d 658 (1969), where the Court said, "the trial court has broad discretion to fashion its decree according to the circumstances of each case," and "the district court did not abuse its discretion in refusing to award pre-judgment interest." Such a holding is consistent with this Court's opinion in *Wirtz* v. *Old Dominion Corp.*, 286 F.Supp. 378 (1968), in a suit filed by the Secretary pursuant to Section 216(c) of the Fair Labor Standards Act. In *Old Dominion* we held that pre-judgment interest should not be recovered under the facts of that case, citing *Ahearn* v. *Holmes Electric Protective Co.*, 110 F.Supp. 822 (S.D. N.Y. 1953); *Addison* v. *Huron Stevedoring*, 204 F.2d 88 (2d Cir 1953). In those cases neither pre-judgment interest nor liquidated damages were allowed. Cf. *Foremost Dairies* v. *Ivey*, 204 F.2d 186 (5th Cir. 1953). The *Old Dominion* decision has been recently followed in *Hodgson* v. *Daisy Manufacturing Company*, 317 F.Supp. 538 (W.D. Ark. 1970). There, Senior Judge Miller went into fairly extensive detail concerning the question. Initially, he points out that Section 17 of the Fair Labor Standards Act (the Act) does not provide for the recovery of liquidated damages for delay or for interest. The United States Supreme Court has held, however, that

> the failure to mention interest in statutes which create obligations has not been interpreted by this Court as manifesting an unequivocal congressional purpose that the obligation shall not bear interest. . . . [I]n the absence of an unequivocal prohibition of interest on such obligations, this Court has fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congressional purpose

in imposing them and in the light of general principles deemed relevant by the Court.

. . .

[A] persuasive consideration in determining whether such obligations shall bear interest is the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed. And this Court has generally weighed these relative equities in accordance with the historic judicial principles that one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained. *Rodgers* v. *United States*, 332 U.S. 371, 393 (1947).

In *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1944), the Supreme Court held that it was improper to award interest under Section 16(b) of the Act because an employee could obtain liquidated damages thereunder and that interest and liquidated damages *serve the same function*. Seventeen years after *Brooklyn Bank*, Congress amended the Act to deny liquidated damages as compensation in a suit brought under Section 17 of the Act. It may not be unreasonable to assume that in doing so, Congress was likewise expressing an unequivocal intent to deny pre-judgment interest in suits brought under Section 17 as well. In Conference Report No. 327, a statement by the managers of the amendments on the part of the House of Representatives, the authors stated:

The committee of conference adopted provisions (secs. 16(b) and (17)) contained in the Senate amendment but not in the House bill, dealing with enforcement of

> the minimum wage and overtime pay requirements of the act. Under these provisions, the Federal district courts would be authorized, in injunction actions brought by the Secretary of Labor, to issue court orders requiring employers to cease unlawful withholding of minimum wages and overtime compensation found by the court to be due to employees under the act. *In such actions only the minimum wages and overtime pay found due under the act may be awarded* and no award shall be made of any additional amount as liquidated damages. *2 U.S. Code Cong. and Admin. News,* p. 1713, 87th Cong., 1st Sess. (1961). (emphasis added)

From the above, it would seem that since Congress eliminated liquidated damages, and made no reference to the allowance of interest, that Congress intended to follow the customary rule that "the failure to mention interest in statutes which create obligations has not been interpreted by this Court as manifesting an unequivocal congressional purpose that the obligation shall not bear interest." *Rodgers* v. *United States, supra.*

In *Brooklyn Bank, supra,* Mr. Justice Reed said that § 16(b) of the Act "authorizes the recovery of liquidated damages as compensation for delay in payment of sums due under the Act," and that inasmuch as Congress has fixed the liquidated damages, it was not the intent of Congress to have the employer also pay interest.

In *Hodgson* v. *Daisy Manufacturing Company,* 317 F.Supp. 538 (W.D. Ark. 1970), the Court refused to allow interest. Upon appeal, the lower court's decision was affirmed as to all issues except the failure to allow interest. *Hodgson* v. *Daisy Manufacturing Co.,* .... F.2d ...., decided

July 13, 1971 (8th Cir.). In answering the issue that the employer had acted in good faith, the Court said that "employees should not be penalized for the failure of the Secretary to prosecute diligently an action. The equities here lie with the employees." *See, Shultz* v. *Mistletoe Express Service, Inc.*, 434 F.2d 1267 (10th Cir. 1971); *Shultz* v. *Parke*, 413 F.2d 1364 (5th Cir. 1969); *Wirtz* v. *Malthor, Inc.*, 391 F.2d 1 (9th Cir. 1968).

The United States Court of Appeals for the Fourth Circuit and this Court have established the position that pre-judgment interest should be awarded where the amount of damages is reasonably ascertainable. *See, Gardner* v. *National Bulk Carriers, Inc.*, 221 F.Supp. 243 (E.D. Va. 1963), affirmed 333 F.2d 676 (4th Cir. 1964); *Robert C. Herd & Company* v. *Krawill Machinery Corporation*, 256 F.2d 946, 953-4 (4th Cir. 1968); *Chesapeake & Ohio Railway Corp.* v. *Elk Refining Co.*, 186 F.2d 30, 33 (4th Cir. 1950); *Railroad Credit Corporation* v. *Hawkins*, 80 F.2d 818 (4th Cir. 1936). In *Railroad Credit Corporation* v. *Hawkins, supra*, the Fourth Circuit cited *Spalding* v. *Mason*, 161 U.S. 375, for the proposition that "Both in law and in equity, interest is allowed on money due." 80 F.2d 818, 826 (4th Cir. 1936).

In *McClanahan, et al.* v. *Mathews*, ... F.2d ..... (6th Cir., decided April 8, 1971) the Court said:

> It is well settled that "one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual monetary damages by another's breach of that obligation should fairly be compensated for the loss thereby sustained." *Rogers* v. *United States, supra*, 332 U.S. at 373. In the closely analagous situation of back pay awards in labor cases, this Court and five other courts of appeals have applied this prin-

ciple so as to allow interest from the time the claims accrued. *See Philip Carey Mfg. Co., Miami Cabinet Div.* v. *NLRB,* 331 F.2d 720, 729-31 (6th Cir. 1964), cert. denied, 379 U.S. 888, *Marshfield Steel Company* v. *NLRB,* 324 F.2d 333, 338 (8th Cir. 1963); *Reserve Supply Corp of L.I., Inc.* v. *NLRB,* 317 F.2d 785 (2d Cir. 1963); *International Brotherhood of Operative Potters* v. *NLRB,* 320 F.2d 757 (D.C. Cir. 1963); *NLRB* v. *Globe Products Corporation,* 322 F.2d 694 (4th Cir. 1963); *Revere Copper and Brass, Inc.* v. *NLRB,* 324 F.2d 132, 137 (7th Cir. 1963). The reasoning of our Court in *Philip Carey, supra,* is particularly relevant here:

> "It is recognized under our legal system that wage-earners are heavily dependent upon wages, which more often than not constitute the sole resource to purchase the necessities of life from day to day. For example, many states have enacted statutes regulating the time of payment of wages. The National Bankruptcy Act accords priority to wage claims. Many wage-earners who are deprived of their wages doubtlessly find it necessary to borrow money to sustain themselves and their families, paying rates of interest at six per cent or higher." 331 F.2d at 730. [citations omitted.]

In view of the fact that most of the circuits have awarded pre-judgment interest in cases similar to the case at bar—although there is no opinion from the Fourth Circuit directly in point—I am of the opinion that pre-judgment interest should be awarded.

At time of oral argument, counsel suggested they were in accord as to the form of order to be entered, except on the

interest claim. Counsel will therefore promptly present order for entry.

/s/ Richard B. Kellam
United States District Judge

Norfolk, Virginia

July 28, 1971

* * *

[Caption Omitted]

JUDGMENT

This matter having come before the court on the mandate of the United States Court of Appeals for the Fourth Circuit for further proceedings not inconsistent with the opinion of that court, it is hereby

Ordered, Adjudged, and Decreed that defendants, their agents, servants, and employees be, and they hereby are, permanently enjoined and restrained from withholding payment of minimum wages and overtime compensation due under the Act to their employees as listed in plaintiff's exhibit No. 2, in evidence herein, in the total amount of $26,561.09, plus interest. Defendants shall compute interest at 6 per centum per year on the amounts due as listed in the abovementioned exhibits from the median date of withholding from each person listed in exhibit No. 2, until payment.

Defendants shall deliver to plaintiff's attorneys separate checks made payable to each employee, including interest, after legal payroll deductions. Plaintiff shall distribute the monies thus collected to the persons named, or to their legal representatives, as their interests may appear, and any

sum not paid out by the plaintiff within a reasonable time (either because of inability to locate the person to whom the money is due or his legal representative, or because of such person's refusal to accept payment) shall be covered into the Treasury of the United States as miscellaneous receipts. This judgment shall not be enforced until the time has expired for defendants to seek certiorari, or until defendants' petition for a writ of certiorari is finally acted upon if such petition is timely field.

It is further ordered that court costs be taxed to defendants.

Dated this 28th day of January, 1972.

/s/ Richard B. Kellam
United States District Judge

* * *

[Caption Omitted]

NOTICE OF APPEAL

Notice is hereby given that the defendants, above named, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the Opinion and Order of the Fourth Circuit granting plaintiff's claim and for pre-judgment interest entered in the cause on January 28, 1972.

E. E. Falk
A. L. Drucker
E. B. Drucker
David Falk
R. E. Smith

By /s/ E. D. David
Of Counsel

APPENDIX C

IN THE UNITED STATES SUPREME COURT

No. 70-225

E. E. Falk, individually and as partner in Drucker & Falk, et al.,

Petitioners

v.

James D. Hodgson,

Respondent.

October 12, 1971. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 14, 572

George P. Shultz, Secretary of Labor,
United States Department of Labor,
Appellant,

versus

E. E. Falk, individually and as a partner in
Drucker and Falk, et als.,
Appellees.

Appeal from the United States District Court for the
Eastern District of Virginia, at Newport News.
Richard B. Kellam, District Judge.

(Argued January 8, 1971 Decided March 3, 1971.)

OPINION AND ORDER

WINTER, Circuit Judge:

The Secretary of Labor sued for an injunction under § 17 of the Fair Labor Standards Act, 29 U.S.C.A. §§ 201, *et seq,* to enjoin defendants from violating the minimum wage, overtime, and record-keeping provisions of the Act, and to restrain them from withholding back wages owed

to their employees. Defendants are copartners carrying on a building management business and the employees concerned are maintenance workers. The district court denied relief on the grounds that the defendants were not covered by the Act during the period in question because defendants' "annual gross volume of sales made or business done" was insufficient to effect coverage and because defendants' activities did not constitute an "enterprise." The district court also concluded that defendants were not the "employer" of the maintenance workers. We think otherwise and reverse.

— I —

Defendants manage approximately thirty apartment buildings located in various cities in Virginia. In addition they engage in selling real estate and insurance. Their real estate management is carried on under contracts with the owners, some of whom are nonresidents of Virginia. Defendants advertise the availability of apartments for rent; sign, renew and cancel leases; collect rents, initiate, prosecute and settle all legal proceedings for eviction, possession of the premises and unpaid rent; make repairs and alterations; negotiate contracts for electricity, gas, fuel, water, telephone services, window cleaning, rubbish removal, repair work and other services; purchase supplies; pay all bills, including mortgage payments; prepare an operating budget for the owner's review and approval; submit periodic reports to the owner; and hire, discharge and supervise all labor and employees required for the operation and maintenance of the premises. The contracts are for specified periods, not less than a year. The owner is made responsible for all expenses except those wrongfully incurred by defendants, and the defendants hold the rent money in trust

for the owner, pay expenses out of it, and periodically remit the excess to the owner. Any excess of expenses over rents collected must be made up by the owner. As payment for their services, defendants receive a fixed percentage of gross rent receipts.[1]

To carry out their contractual management duties, defendants employ various management employees, including six area managers, and various clerical employees and rental agents, all of whom are admitted by defendants to be their employees. Defendants carry out the day-to-day operations of each project through a maintenance superintendent or project manager who is, under the supervision of the area manager, in charge of each project, and who hires, fires, and supervises the maintenance employees. Each project manager and his maintenance employees are characterized in the contract between defendants and the owner as employees of the owner, although defendants hire and fire them, promote them and make out their paychecks, for which they are reimbursed by the owners. The owners do not appear to exercise any supervisory power over the maintenance workers beyond approval or disapproval of the overall budget. The owners inspect their projects but direct their suggestions to the defendants. Occasionally, but only rarely, defendants have transferred maintenance personnel from one project to another; in each case, this was done with the knowledge of the owners. Defendants employ some maintenance personnel to work on two projects with different owners.

The owners are not parties to this suit. We are told that, viewed separately, the gross rental income of each project except one, is too small for it to be covered by the Act.

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[1] The size of these commissions does not appear in the record, but two sample contracts were included in the stipulation of facts. One of these provided for a 4% commission and the other for a 6%.

— II —

The Secretary's complaint, filed in 1969, charged defendants with failing to pay the wages and keep the records required by the Act. The Fair Labor Standards Act requires covered employers to pay their employees a minimum wage of $1.60 an hour, with various exceptions, including lower rates for employees newly brought under the Act by the 1966 Amendments.[2] There is a time-and-a-half pay requirement for work beyond forty hours a week, with similar

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[2] 29 U.S.C.A. § 206 provides in part:

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than $1.40 an hour during the first year from the effective date of the Fair Labor Standards Amendments of 1966 and not less than $1.60 an hour thereafter, except as otherwise provided in this section:

* * *

(b) Every employer shall pay to each of his employees (other than an employee to whom subsection (a) (5) of this section applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966, wages at the following rates:

(1) not less than $1 an hour during the first year from the effective date of such amendments,

(2) not less than $1.15 an hour during the second year from such date,

(3) not less than $1.30 an hour during the third year from such date,

(4) not less than $1.45 an hour during the fourth year from such date, and

(5) not less than $1.60 an hour thereafter.

exceptions for employees recently covered.[3] Relevant record-keeping provisions are also set forth in the margin.[4]

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[3] 29 U.S.C.A. § 207 provides in part:

(a) (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

[4] 29 U.S.C.A. § 211 provides in part:

§ 211. Investigations, inspections, records, and homework regulations

* * *

(c) Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

In the district court, defendants did not contend that the employees received these levels of pay, but denied that the Act applied, arguing that the coverage conditions of the Act were not satisfied. Defendants argued there and before us that they were not the "employer" of the workers at the apartment buildings within the meaning of the Act, and that their business was not an "enterprise" as required for application of the Act. In addition, they argued that their annual gross volume of sales was less than that required for application of the Act, and that they did not have "employees engaged in commerce."

The district court found for the defendants on the grounds that their annual volume of sales was insufficient, holding that the rents collected by defendants could not be included in gross sales. The court also expressed doubt that defendants were an "enterprise" within the meaning of the Act, because they acted solely as agents for apartment owners. Because defendants were the owners' agents, the district court concluded that the maintenance employees were employees of the project and not employees of defendants.[5]

Because of the two-year statute of limitations, 29 U.S.C.A. § 255(a), we are hereby concerned solely with back wages during the period after January 30, 1967, two years before the filing of the complaint.[6] In 1966, the Act was amended in ways pertinent to this case, and the amendments took effect on February 1, 1967. Thus, the 1966 amendments were in effect during all the pay periods here at issue.

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[5] *Shultz* v. *Falk*, 312 F.S. 608 (E.D.Va. 1970).

[6] 29 U.S.C.A. § 255, as amended, provides a three-year statute of limitations for wilful violators. The complaint does not allege wilful violation.

— III —

First, we turn to defendants' contention that they are not the employers of the workers at the apartment projects. The Act states that " 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ."[7] "Employee" is defined as including "any individual employed by an employer,"[8] and "Employ" is defined as including "to suffer or permit to work."[9] These definitions are very broadly cast, and the courts have accordingly found an employment relationship for purposes of the Act far more readily than would be dictated by common law doctrines. See, *e.g., Rutherford Food Corp.* v. *McComb,* 331 U.S. 722 (1945) (workers in slaughterhouse who removed bones from carcasses held to be employees of the slaughterhouse despite the fact that in some respects their operations were conducted like those of an independent contractor;) *Southern Ry. Co.* v. *Black,* 127 F.2d 280 (4 Cir. 1942) (redcaps in railroad station held employees of the railroad despite the fact that their compensation was solely derived from tipping;) *McComb* v. *Homeworkers' Handicraft Cooperative,* 176 F.2d 633 (4 Cir. 1949), *cert. den.,* 338 U.S. 900 (1949) (piece-workers who inserted draw strings in bags for bag manufacturers held employees of manufacturers despite the fact that their pay and work was distributed through a home-workers' cooperative.) Courts have also found that workers could have joint employers for purposes of the Act. See *Mid-Continent Pipe Line Co.* v. *Hargrave,* 129 F.2d 655

[7] 29 U.S.C.A. § 203(d).
[8] 29 U.S.C.A. § 203(e).
[9] 29 U.S.C.A. § 203(g).

(10 Cir. 1942); *Durkin* v. *Waldron,* 130 F.S. 501 (W.D. La. 1955).[10]

The Second Circuit has held that rental agents may be employers, jointly with the building owners. In *Greenberg* v. *Arsenal Building Corp.,* 144 F.2d 292 (2 Cir. 1944) (per curiam), rev'd in part on other grounds, 324 U.S. 697 (1945), the Court held that a rental agent was properly found to be the employer of maintenance workers where the agent hired and supervised the workers, and paid them wages, for which it was reimbursed by the owners. The same result was reached in *Asselta* v. *149 Madison Avenue Corp.,* 65 F.S. 385 (S.D.N.Y. 1945), affirmed, 156 F.2d 139 (2 Cir.), *cert. den.,* 331 U.S. 199 (1946); in *Shultz* v. *Arnheim & Neely, Inc.,* ..... F.S. ..... (W.D. Pa. 1969), appeal docketed Nos. 18772-18774 (3 Cir.); and in *Shultz* v. *Isaac T. Cooke Co.,* ..... F.S. ..... (E.D.Mo. 1970).

It is true that building rental agencies are not as fully vested with the powers and benefits involved in being an employer as a company which owned as well as operated its buildings would be. Rental agencies, such as defendants here, are not solely responsible for the setting of wages, nor are they the sole beneficiaries of the underpayment of wages. But they may share a substantial part of these powers and benefits. Defendants either directly or indirectly hire, fire, and supervise the building workers. Within the limits of generalized and fairly long-term budgets, they set the wages of the building workers. Even the decisions behind budget allocations appear to be considerably influenced by defendants' recommendations, since defendants

[10] The possibility that the workers here may be jointly employed distinguishes *Wirtz* v. *Columbian Mutual Life Ins. Co.,* 246 F.S. 198 (W.D.Tenn. 1965), *aff'd.,* 380 F.2d 903 (6 Cir. 1967), relied on by the court below. In *Columbian Mutual,* service and custodial workers were held to be employees of the building owner. No building management company was a party.

are real estate management experts. We, therefore, have no doubt that defendants act "directly or indirectly in the interest of an employer in relation to an employee" and that the maintenance workers are "employees" of, and "employ[ed]" by, defendants within the statutory definition of the Act.

— IV —

Next, we consider defendants' contention that they are not an "enterprise" within the meaning of the Act, the operative wages and hours sections of which apply to employees "employed in an enterprise engaged in commerce or in the production of goods for commerce . . . ."[11]

"Enterprise" is defined in pertinent part as:[12]

> the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor . . . .

The district court's doubts as to whether defendants and the employees involved are part of an enterprise arose from the fact that the various apartment projects do not constitute a part of defendants' establishment. Similarly, before

[11] 29 U.S.C.A. §§ 206 and 207. These sections also apply to employees "engaged in commerce or in the production of goods for commerce" without regard to the enterprise requirement. The Secretary does not argue that the workers whose wages are at issue here are themselves engaged in commerce.

[12] 29 U.S.C.A. § 203(r).

us defendants have relied heavily on authorities indicating that use of common services will not readily be held to make several otherwise independent businesses part of the same enterprise. See, *e.g.*, Senate Report No. 145, 1961 U.S. Code Cong. and Admin. News 1620, 1661-62; *Wirtz* v. *Hardin & Co.*, 253 F.S. 579 (N.D. Ala. 1964), *aff'd.*, 359 F.2d 792 (5 Cir. 1965) (per curiam) (Piggly Wiggly grocery stores not part of the same enterprise where all they had in common was certain shareholders and contracts entitling them to use the Piggly Wiggly name.) The argument is that since each building is run by its owner for a different business purpose, they cannot all have a common business purpose.

This argument was rejected by the court in *Shultz* v. *Arnheim & Neely, Inc., supra,* and we agree. It is *defendants'* activities at each building which must be held together by a common business purpose, not all the activities of all owners of apartment projects. All that the enterprise requirement entails is that the defendants maintain under "common control" or as a "unified operation" a set of "related activities" having a "common business purpose," and that their employees be employed as a part of this operation. The organization and operation of defendants' apartment management business satisfy these requirements. Defendants supervise the employees involved here through a hierarchy terminating in their central offices. The services provided are substantially similar from project to project, and have the common purpose of maintaining and operating apartment buildings. The building workers are employed in this enterprise, since they are under defendants' control and carry out its purposes. The fact that they are employed at separate buildings does not prevent their being part of the same enterprise for purposes of the Act. See § 203(r),

supra; Shultz v. *Mack Farland & Sons Roofing Co.*, 413 F.2d 1296 (5 Cir. 1969) (two corporations engaged in the same business in different areas, but controlled by the same man, held to be a single enterprise); *Witrz* v. *Barnes Grocer Co.*, 398 F.2d 718 (8 Cir. 1968) (wholesale and retail grocery stores with substantially overlapping ownership held to be a single enterprise). Nor do we think that the building employees are removed from defendants' enterprise by the fact that some control over the employees may be exercised by the owners, or the fact that the employes' work under the contracts serves the owners' purposes as well as those of defendants. Defendants exercise substantial control and to a great extent their employees serve their common purposes and carry out related activities; this is enough to make them part of defendants' enterprise.

—V—

Next, defendants contend that their annual gross volume of sales was insufficient to bring them within the requirements of the Act. Defendants' answers to interrogatories established that gross rentals collected were approximately $7,700,000 in 1967 and $8,600,000 in 1968 and that gross commissions received were $434,000 in 1967 and $463,000 in 1968.

The Act defines an "[e]nterprise engaged in commerce or in the production of goods for commerce," *inter alia*, as one which:

> during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) . . . and beginning February 1, 1969, in an enterprise whose annual gross volume of sales or

> business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated) . . . .[13]

Thus, the issue is whether defendants met the $500,000 volume requirement during the period February 1, 1967, through January 31, 1969. it is not disputed that the $250,000 requirement for the period after February 1, 1969, was satisfied.

The government argues that the entirety of the rents collected should be included in defendants' gross sales and business done for purposes of the Act; defendants contend that only their commission should be counted. We agree with the government's contention.

Decided cases settle the proposition that rental of property constitutes a "sale" within the meaning of the Act's enterprise coverage provisions. *Wirtz* v. *Savannah Bank & Trust Co.*, 362 F.2d 857 (5 Cir. 1968); *Wirtz* v. *First National Bank and Trust Company*, 365 F.2d 641 (10 Cir. 1966); *Wirtz* v. *Columbian Mutual Life Insurance Company*, 380 F.2d 903 (6 Cir. 1967). This is so because "sell" is defined by the Act as including "any sale, exchange, consignment for sale, shipment for sale, *or other disposition.*" (emphasis supplied.)[14]

The district court avoided the thrust of this proposition by holding that when rentals, i.e., "sales," were made by defendants in their capacity as agents, the measure of their volume was not gross rents (as they would be had defendants owned the buildings) but gross commissions. There is no statutory support for this distinction, and it is contrary to decided cases. The Act speaks of "any" sale—a

[13] 29 U.S.C.A. § 203(k).

[14] 29 U.S.C.A. § 213(a)(2).

characterization broad enough to include sales made in an agency capacity. The only exclusion from gross sales in the Act is for separately stated retail sales taxes. The legislative history indicates that, in fixing dollar volume tests, Congress was concerned not with an enterprise's income or profit but with its size and impact on commerce. S. Rep. 1487, 89 Cong., 2d Sess., pp. 7-8; 2 U.S. Cong. & Adm. News (1966) p. 3009. Defendants' impact on commerce would appear to be the gross volume of rents it collects, not just the amounts it is entitled to pocket. It was observed in *Wirtz* v. *First National Bank and Trust Company, supra,* 365 F.2d at 645, with regard to a management company that it "markets the property under its control by renting or leasing space to tenants. This is a 'disposition' within the statutory definition, and, we believe, conforms with the congressional intent to set a standard of size of those businesses which would be covered by the 1961 amendments."

In two cases directly in point, the Tenth and Fifth Circuits have held that the term "annual gross volume of sales" means "gross receipts" from all sales, whether made by one as agent for another or by one for his own account. *Wirtz* v. *First National Bank and Trust Company, supra; Wirtz* v. *Jernigan,* 405 F.2d 155 (5 Cir. 1968). The *First National Bank* case involved a management company which operated an office building owned by a bank. The management company had no ownership in the property and was accountable to the bank for the rentals paid to it by the tenants. Nonetheless, the court pointed out that it was the management company which "markets the property" and the court measured its "annual gross volume of sales made" by the amount of the rentals which it received rather than simply by the amounts which it deducted to cover its "management fee" and expenses.

In the *Jernigan* case, the defendant, a restaurant owner who also operated a Greyhound bus agency, argued that his annual "sales" from the bus agency were his commissions and not the ticket receipts which he transmitted to Greyhound. How sales of bus tickets should be measured was essential to a determination of whether Jernigan could avail himself of the retail establishment exemption of 29 U.S.C.A. § 213(a)(2), but the test for this exemption is the same as the test for application of the "enterprise coverage" provisions of the Act. The court held that the total proceeds from the ticket sales must be included in determining defendant's annual dollar volume of sales.

Two district court cases on facts virtually identical to those presented here have held "that gross rentals from defendant's [building] management activities must be included in determining its annual gross volume of sales made or business done." *Shultz* v. *Arnheim & Neely, Inc., supra,* ..... F.S. at .....; *Shultz* v. *Isaac T. Cooke Co., supra.*

In addition to judicial authority, the Wage-Hour Administrator has consistently ruled that the annual gross volume of a real estate management company is measured by the total rentals received from the building it operates. See Opinion Letter No. 182 (September 9, 1963), and No. 227 (January 31, 1964), 91 Wage and Hour Manual 1034c, 1024. See also, Opinon signed by the Administrator on September 28, 1967, 91 Wage and Hour Manual 1034g. As we have recently pointed out while "opinion letters are not binding on the courts they do constitute 'a body of experienced and informed judgment' which have been given considerable and in some cases decisive weight." *Shultz* v. *Hartin & Son, Inc.*, 428 F.2d 186, 191 (4 Cir. 1970).

Considering, therefore, the language of the Act, its legislative history and how it has been applied by other courts, as well as by the Wage-Hour Administrator, we conclude

that the gross rents received by defendants are the proper measure to determine whether they have met the $500,000 volume test in order to be an "enterprise engaged in commerce or in the production of goods for commerce" during the period February 1, 1967, through January 31, 1969. Defendants fall within the definition.

—VI—

Finally, defendants contend that they have no employees engaged in commerce. The enterprise concept embodied in 26 U.S.C.A. § 203(s) requires as part of the definition of "enterprise engaged in commerce" that there be "employees engaged in commerce or the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person." It is unnecessary for the employee to whom the Act is sought to be made applicable, himself, to be engaged in commerce; it is sufficient if another employee of the enterprise is so engaged. *Maryland* v. *Wirtz*, 392 U.S. 183 (1968).

The facts stipulated by the parties in the district court include stipulations that at least two of defendants' employees at their main office in Newport News, Virginia, have been engaged in handling, preparing, mailing or otherwise working on insurance policies or other materials for transmission across state lines to each of certain named insurance companies having their offices in Pennsylvania, New Jersey, Ohio and Rhode Island. It was also stipulated that, as a regular incident of their management of rental property, employees of the buildings managed by defendants repair plumbing, heating and air conditioning units, and that substantial portions of the materials used in these activities moved across state lines. Finally, it was stipulated

that, at each of three of the apartment houses managed by defendants, at least one employee has been regularly engaged in telephone and mail communications with the owners of the buildings across state lines concerning their operation. There can be no doubt that defendants do have employees engaged in commerce. *Cf., Maryland* v. *Wirtz, supra.*

The judgment of the district court is reversed, and the case is remanded for further proceedings not inconsistent with the views expressed herein.

REVERSED and REMANDED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

NEWPORT NEWS DIVISION

Civil Action No. 12-69-NN.

GEORGE P. SHULTZ, Secretary of Labor,
United States Department of Labor,

Plaintiff,

v.

E. E. FALK, Individually and as a partner in
Drucker & Faulk, et als.,

Defendants.

OPINION AND ORDER

The five individual defendants are partners engaged in business of "selling real estate and insurance and managing rental property." As a part of their activities, defendants manage or supervise numerous apartment projects under contracts with the owners. These contract rental payments "as received are deposited in an in and out account on behalf of the owner and expenses[1] are paid out of this account with the balance distributed immediately after receipt. Ownership remains with the owner and not the defendants and contractual arrangement is one of owner and rental

[1] Expenses of the project, but not of defendant.

agent."[2] All facts are stipulated, and no oral evidence was presented.

The management agreements between owners of the apartments and defendants refer to defendants as "Agent." Among other things, the agreement requires defendants to deposit the collected rents into a trust account, "separate from Agent's personal account," and Owner may require Agent to establish a separate trust account for the property. The agreement also conveys certain specific powers upon the Agent, namely to advertise the project, and make repairs and alterations. Owner agrees to hold and save Agent harmless and free from damages or injuries to persons or property, to carry liability insurance, and the agreement provides Agent is only liable for errors of judgment or mistake of fact or law if it constitutes willful misconduct or gross negligence.

The real issue is whether the gross rentals collected by defendants as Agents for the Owners of the various rental projects should be included on determining the "annual gross volume of sales made or business done." Plaintiff says yes, namely, that the total sum of all the rentals collected by defendants from the various rental projects for the Owners must be included in determining the annual gross volume of sales made or business done. Defendants say no, namely, that only the gross commissions which defendants receive from the Owners of the projects should be considered in determining the annual gross volume of sales made or business done; that the rents collected from each apartment project were the property of the Owner and only passed through defendants' hands as Agents. We are only concerned in this action with the period of February 1, 1967, through January 31, 1969, since it is agreed

[2] Stipulated in "Order on Final Pre-Trial Conference."

that even under the defendants' theory of accepting the gross commissions as the measure of the gross volume of sales made or business done as the true test, defendants after January 31, 1969, come within the economic test.

Title 29 § 203(s)(1) provides:

> "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—
>
> > (1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated).

The Act was amended in 1961 and again in 1966. The principal purpose of the 1961 amendment was to incorporate into the Act the "enterprise" theory. It likewise appears that the 1966 amendment was to clarify and define rather than extend the "gross sales test" which had been included in the 1961 amendment. This very issue is dealt with in *Wirtz* v. *Columbian Mutual Life Insurance Com-*

pany, 380 F.2d 903, 908 (6th Cir. 1967), where the Court said:

> The economic test embodied in section 3(s)(3) was changed by the Fair Labor Standards Amendments of 1966 to read "annual gross volume of sales made *or business done.*" (Emphasis added.) It is of course arguable that the purpose of the amendment was to extend coverage to enterprises which Congress had theretofore intentionally excluded by use of the narrowly defined gross sales test. However, Senate Report No. 1487, 89th Cong., 2d Sess., p. 7, U.S. Code Cong. & Admin. News 1966, p. 3002, provides:
>
> > "The phrase 'business done' has been added to the definition of 'enterprise engaged in commerce or in the production of goods for commerce' to reflect more clearly the intended meaning of the economic test of business size expressed in the present act in terms of 'annual gross volume of sales.' This test, as shown by Senate Report No. 145 * * * (and now judicially confirmed by the courts in Wirtz v. Savannah Bank & Trust Company (C.A. 5, June 27, 1966) [362 F.2d 857] and Wirtz v. Columbian Mutual Life Insurance Company, 246 F. Supp. 198), [the instant case] is intended to measure the size of an enterprise for purposes of enterprise coverage in terms of the annual gross volume in dollars * * * of the business transactions which result from activities of the enterprise, regardless of whether such transactions are 'sales' in a technical sense."
>
> Although this Report apparently goes beyond the decision herein in attributing a broad meaning to the

word "sale," it is clear that the purpose of the recent amendment was not to extend coverage but rather, to clarify the provision under consideration and to "remove any possible reason for misapprehension." It follows that the District Court correctly held that appellant's investment income should be included as part of its "annual gross volume of sales."

In this case there can be no question defendants do not own the apartment projects, nor do they control or operate them, except as Agent for the Owners; nor is the rent collected the property of defendants. These monies are to be deposited in a special trust account, and may only be comingled "in one trust account maintained by Agent for all or several clients or properties managed by Agent," [Def. Ex. 1] and Owner may even require Agent to maintain a special account for said fund. More than a debtor-creditor relationship exists. The sums to be distributed from said collections are controlled by the Owner. The rentals do not belong to defendants any more than the deposits of a bank belong to it, or the proceeds of a personal injury settlement made by a lawyer on behalf of his client belong to him, or the proceeds of a loan being closed by a lawyer for his client belong to the lawyer, or the proceeds of a sale of real estate made by an agent for his customer belong to the agent. Is a lawyer who represents a large estate and who on behalf of that estate handles the sale of stocks, bonds, real estate and other assets, collects and distributes the funds, to be charged with the gross sum collected and distributed as a part of "annual gross volume of sales made or business done?" In many places the lawyer's revenue license to do business is a tax computed on gross receipts.

Would the position of defendants be any different if the collections were deposited in a bank account in the name of

the Owner, and defendants were given authority to check on that account for the purpose of properly disbursing the funds? Or, would the situation be different if the funds were deposited in the name of Owner, and Owner drew a check to defendants for the commissions due defendants?

In *Wirtz* v. *Columbian Mutual Life Insurance Co.*, 246 F.Supp. 198 (W.D. Tenn. 1965), affirmed 380 F.2d 903 (6th Cir. 1967), the issue was whether investment income, including proceeds from sales or exchanges of stocks and bonds, interest, dividends, etc., should be included in gross sales. In determining that receipts from sales and exchanges of stocks and bonds should not be included, the Court said [246 F.Supp. 198, 204]:

> It appears to us, therefore, that we must choose between a literal application of the definition of a "sale" contained in Sec. 3(k) of the Act, and an interpretation of "annual gross volume of sales" contained in Sec. 3(s)(3) which would carry out the intention of Congress (1) that coverage depend upon the size of the business and (2) that receipts would be included which do not result from transactions that could be called a sale under the Sec. 3(k) definition. We conclude that the clear intention of Congress should prevail. Accordingly, we believe that receipts from these sales and exchanges of stocks and bonds should not be included. The fortuitous circumstance of the amount of sales or exchanges of stocks and bonds for reinvestment in a particular year would be little, if any, indication of the size of the business. Nor would, for example, the sale of the office building be such an indication. On the other hand, the amount of investment income, along with the amount of premium income, does indicate the size of a life insurance business.

In affirming the above decision, 380 F.2d 903 (6th Circuit 1967) at page 907, the Court of Appeals said:

> As the District Court noted, the legislative history of the Act reveals that "finance" companies, "whose income would certainly be interest," were intended to be embraced within the enterprise provisions of the 1961 amendments. Both the House and Senate Reports provide:
>
> > "This section [now 3(s)(3)] would provide minimum wage and overtime protection under the act for approximately 100,000 additional employees in such enterprises as wholesale trade, finance, insurance, real estate, transportation, communications, and public utilities, and business, accounting, and similar services."
>
> Senate Report p. 1650; House Report No. 75, 87th Cong., 1st Sess., p. 13. And, as indicated above, it has now been judicially established that banking enterprises are covered under the Act. While not suggesting that the operation of a bank is identical with the operating of an insurance company, it is difficult to perceive why income derived from a bank's investments should be counted as gross sales, while the investment income of an insurance company recognized as a major source of underwriters' revenue, would not similarly be included.

It is noted the term "income" is used in the determination of gross sales, and not the sale price of stocks, bonds, etc. And that Court continuing on page 908, said:

> Thus it is here determined that with respect to insurance companies as in the case of banks, where the in-

vestment of money in various manners constitutes an integral and closely related aspect of the general overall business, and the income received from such investments constitutes a regular and substantial portion of such enterprises total annual income, investment income (whether denominated investment income or not) is properly includable within the enterprises "annual gross volume of sales" as that term is used in 3(s)(3).

In *Schmidt* v. *Randall*, 160 F.Supp. 228 (D.C. Minn. 1958), and *Mitchell* v. *Carratt*, 160 F.Supp. 261 (S.D.Fla. 1956) the issue was whether the commissions from the sale of bus tickets retained by Schmidt, a hotel operator, and Carratt, a restaurant operator, as compensation for selling bus tickets for the bus line at their respective places of business or the total sales price of the tickets should be included in the gross receipts in determining the annual dollar volume of sales of goods or services. Each Court held that only the commissions received should be included, as opposed to the sales price of the tickets. To the contrary is the case of *Wirtz* v. *Jernigan*, 405 F.2d 155 (5th Cir. 1968). Defendants say that in *Jernigan* it was the owner of the "establishment" who was involved, while here defendants are not the owners of the various apartment projects.

If the Committee of Congress in preparing the amendments had intended that the sales price of all real estate sold by any real estate agent or broker or the total rental of any lease should be included in the term "annual gross volume of sales made or business done," it would have said so either directly or by example in reporting the Act to Congress for passage. It did consider the holding of the Court in *Wirtz* v. *Columbian Mutual Life Insurance Company*, 246 F.Supp. 198, referred to above, Senate Report

No. 1487, U.S. Code Congressional and Administrative News, 1966, Vol. 2, page 3002, at 3008, where at page 3009, it said:

> The phrase "business done" has been added to the definition of "enterprise engaged in commerce or in the production of goods for commerce" to reflect more clearly the intended meaning of the economic test of business size expressed in the present act in terms of "annual gross volume of sales."
>
> * * *
>
> The intent to measure the "dollar volume of sales or business" including "the gross receipts or gross business" in determining coverage of such an enterprise was expressed in the Senate report above cited at page 38. The addition of the term "business done" to the statutory language should make this intent abundantly plain for the future and remove any possible reason for misapprehension. The annual gross volume of sales made or business done by an enterprise, within the meaning of section 3(s), will thus continue to include both the gross dollar volume of the sales (as defined in sec. 3(k)) which it makes, as measured by the price paid by the purchaser for the property or services sold to him (exclusive of any excise taxes at the retail level which are separately stated), and the gross dollar volume of any other business activity in which the enterprise engages which can be similarly measured on a dollar basis. This would include, for example, such activity by an enterprise as making loans or renting or leasing property of any kind.

When it refers to "making loans or renting or leasing property of any kind" it refers to the Owner of the property

renting or leasing the same as was the case in *Wirtz* v. *Savannah Bank and Trust Company*, 362 F.2d 857, and *Wirtz* v. *Columbian Mutual, etc.*, 246 F.Supp. 198 [referred to in the Senate Report] and not the rental agent. In *Wirtz* v. *Columbian Mutual*, supra, the insurance company as owner of the building had a contract with an agent for management of the building [see 380 F.2d 903 at 905], leasing building spaces to tenants, collecting and transmitting the rents, etc. There the agent, subject to appellants approval hired the maintenance and custodial personnel of the building. There, contrary to the position here, the Secretary of Labor contended the maintenance and custodial personnel were employees of Columbian Mutual, rather than the rental agent.

Since the volume of business is one of the tests of whether a business is within the Act, it is difficult to believe Congress intended the measure of the size of the business to be the sum which passed through the business. That is, the total deposits of a bank, as opposed to its gross income; the total receipts of a brokerage firm from sale of properties of others on commission as opposed to the gross sum from sale of its services, its commissions; the total amount of a loan closed as opposed to the lawyer's gross fee; the sales price of real estate sold by a real estate agent or broker as opposed to his commissions. A real estate firm might act as agent for the sale of one parcel of land as a sales price of one million dollars in a year, with few other sales. Under the government's view, such a business, if the other requirements of the Act were met, would come within the Act.

The "gross volume of sales made or business done" is what is sold by the Agent, his services. He cannot sell for himself what is not his. What he sells of the owners he sells for the owners as the owners' agent. This then is the owner's sale. The owner corporation can only act through

agents. What would be different if one of the officers of the corporation—who as an officer is still an agent of the corporation—conducted the same activities as those conducted by defendants for the corporate owner.

While *Shultz* v. *Arnheim and Neely* (W.D. Pa. 1969), yet unreported, holds to the contrary, a reading of the background of the legislation and the briefs of counsel filed herein convinces me the better reasoning supports defendants.

Too, I am not convinced that defendants' activities constitute an enterprise within the meaning of the Act. Defendants are agents. Their activities in selling insurance, selling or renting of real estate, etc., are as agents for others. They operate one business. While they manage the various apartments, they do so as agents of the owners, and from their one establishment. The various apartment projects do not constitute separate establishments of defendants. They are but one part of the business of defendants one establishment. In keeping with *Wirtz* v. *Columbian Mutual,* supra, the managers, service employees, repairmen, etc., are employees of the project and not employees of the defendants.

Again referring to the legislative history, Senate Report No. 1487, U.S. Code Congressional and Administrative News 1966, Vol. 2, page 3002, at 3029, we find this language:

> In any case where a person other than the owner of an apartment building is engaged by the owner to perform management services in connection with the operation of the building, those individuals employed at and resident in the building as managers, caretakers, janitors, or in a similar capacity shall be considered for the purposes of this subsection employees of the building owner.

Further, one of the tests as to whether an enterprise exists by reason of defendants' activities at the various apartments is explained in the legislative history dealing with the 1961 amendment, Senate Report No. 145, U.S. Code Congressional and Administrative News 1961, Vol. 2, page 1620, at page 1661, where it is said:

> There may be a number of different types of arrangements established in such cases. The key in each case may be found in the answer to the question, "Who receives the profits, suffers the losses, sets the wages and working conditions of employees, or otherwise manages the business in those respects which are the common attributes of an independent businessman operating a business for profit?"

While the Court need not reach the issue of whether an injunction should be granted, it is appropriate to say that counsel for plaintiff in oral argument stated this was not a case where an injunction against future violations was necessary or appropriate.

For the reasons hereinabove set out, the relief sought is denied and the suit DISMISSED.

Richard B. Kellam
United States District Judge

Richmond, Virginia
January 16, 1970.

APPENDIX F

PERTINENT STATUTORY PROVISIONS

The pertinent provisions of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, as amended by the Fair Labor Standards Amendments of 1966, 80 Stat. 830, are set forth below, together with the language of Section 3(s)(3) as it read prior to the 1966 amendments (75 Stat. 65, 66):

[DEFINITIONS]

SEC. 3. As used in this Act—

* * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * *.

(e) "Employee" includes any individual employed by an employer * * *.

* * *

(g) "Employ" includes to suffer or permit to work.

* * *

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

* * *

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leas-

ing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor * * *.

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—

(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated) * * *.

Prior to the 1966 Amendments, Section 3(s) read in pertinent part as follows:

SEC. 3(s) "Enterprise engaged in commerce or in the production of goods for commerce" means any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any reason:

* * *

(3) any establishment of any such enterprise except establishments and enterprises referred to in other paragraphs in this subsection, which has employees engaged in commerce or in the production of goods for commerce if the annual gross volume of sales of such enterprise is not less than $1,000,000; * * *.

No. 72-844

In the Supreme Court of the United States

OCTOBER TERM, 1972

E. E. FALK, ET AL., PETITIONERS

v.

JAMES D. HODGSON, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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MEMORANDUM FOR THE RESPONDENT

The petition seeks review of the judgment of the court of appeals rendered in this case on September 11, 1972, upholding the award of pre-judgment interest on back pay awards under Section 17 of the Fair Labor Standards Act. Petitioners also seek to raise three questions of statutory construction (Questions 1-3, Pet. 3) identical to questions presented in an earlier petition for a writ of certiorari in this case, which was denied on October 12, 1971. *Falk* v. *Hodgson*, 404 U.S. 827 (No. 70-225).

Certiorari was opposed by the Secretary of Labor

in No. 70-225 on two of the three issues there presented (Questions 2 and 3 of the present petition). See Memorandum for Respondent in No. 70-225. Since, however, the holding of the court of appeals on the remaining issue (Question 1) presented a conflict with the holding of the Third Circuit in *Hodgson* v. *Arnheim and Neeley, Inc.*, 444 F.2d 609, as to the proper construction of Section 3(r) of the Act, the Secretary stated that he would not oppose the granting of the petition for certiorari limited to that single issue, if the conflict were not resolved by the Secretary's petition for rehearing then pending before the Third Circuit in the *Arnheim* case. Although rehearing was denied in the *Arnheim* case, so that the conflict was not resolved, certiorari was nonetheless denied in the *Falk* case. The Secretary of Labor thereafter petitioned for a writ of certiorari in the *Arnheim* case, and the petition was granted on October 10, 1972 (No. 71-1598). Oral argument in *Arnheim* was heard on January 16, 1973.

1. We adhere to the views expressed in our memorandum in response to the earlier petition in this case. Questions 2 and 3, involving whether the dollar volume requirements of Section 3(s) of the Act are to be based on gross rents or on commissions and whether petitioners are employers of the employees at the buildings, are not before the Court in *Arnheim* (Gov't Br. 13, n. 3), and involve no conflict in the circuits and do not otherwise warrant review by this Court. However, Question 1, the issue of the proper interpretation of the enterprise definition in Section 3(r), is before this Court in *Arnheim*. If this Court agrees with the Secretary's position in *Arnheim*, then it should deny cer-

tiorari in the present case. If, on the other hand, it affirms the judgment of the Third Circuit in *Arnheim*, we would not oppose a remand of the present case for redetermination of the enterprise issue in light of that decision.[1] Accordingly, we suggest that the Court hold the present petition for disposition in light of the *Arnheim* decision.

2. The remaining issue presented by the petition (Question 4) does not warrant review by this Court. There is no conflict among the circuits on the pre-judgment interest point. On the contrary, all of the courts of appeals which have considered the point have held that the award of pre-judgment interest is a proper exercise of the district court's equitable power in actions brought by the Secretary under Section 17 of the Fair Labor Standards Act to enjoin monetary violations of the Act and to restrain the withholding of back wages due to employees by reason of such violations. See *Hodgson* v. *Wheaton Glass Co.*, 446 F.2d 527, 534-535 (C.A. 3); *Hodgson* v. *American Can Company*, 440 F.2d 916, 921-922 (C.A. 8); *Hodgson* v. *Daisy Manufacturing Company*, 445 F.2d 823, 825 (C.A. 8); cf. *McClanahan* v. *Mathews*, 440 F.2d 320, 324-325 (C.A. 6).

This Court's decision in *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, is not to the contrary, as suggested by petitioners. In the first place, that case was not a Section 17 action; it was a Section 16(b) em-

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[1] We oppose an outright reversal here in the event *Arnheim* is affirmed, because the facts in the two cases are different in certain respects, and a decision adverse to the Secretary's position in *Arnheim* would not necessarily require the same result here.

ployee action for unpaid wages and liquidated damages (*i.e.*, double the amount of the unpaid wages). In the second place, the liquidated damages provision was at that time (1945) mandatory (see 324 U.S. at 710-711; cf. *McClanahan* v. *Mathews, supra,* 440 F.2d at 325), so that the interest question before the Court was "whether an employee recovering minimum wages and *liquidated damages* under the provisions of § 16(b) is *also* entitled to interest on the sums so recovered" (324 U.S. at 714; emphasis added). Although the Court denied interest, it expressly recognized that "interest is customarily allowed as compensation for delay in payment" and rested its action on the ground that "[t]o allow an employee to recover the basic statutory wage *and liquidated damages, with interest*" would tend "to produce the undesirable result of allowing *interest on interest*" (324 U.S. at 715; emphasis added).

Respectfully submitted.

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FEBRUARY 1973.

☆ U.S. Government Printing Office: 1973—473-930/491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

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Petitioners,

—v.—

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE REALTY ADVISORY BOARD ON LABOR RELATIONS, INC., *AMICUS CURIAE*

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INDEX

Table of Authorities

PAGE

Other Authorities:

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BRIEF OF THE REALTY ADVISORY BOARD ON LABOR RELATIONS, INC., *AMICUS CURIAE*

Statement of Interest

The Realty Advisory Board on Labor Relations, Inc.* is a membership corporation whose members are owners and managing agents of apartment and commercial buildings in New York City. Its members employ in excess of 20,000 building service employees, and, as representative of its members, the corporation negotiates collective bargaining agreements on their behalf with building service local unions.

* This brief *amicus curiae* is filed pursuant to the consent of all parties to the case. The consents are filed with the Court together with this brief.

Proceedings Below

The Secretary of Labor (hereafter "Respondent") commenced this action under Fair Labor Standards Act §17 to enjoin Drucker & Falk (hereafter "Petitioner"), by its five co-partners, from violating the Act's minimum wage, overtime, and record-keeping provisions and require payment of allegedly owed wages in respect to certain maintenance workers.* Petitioner denied that it had violated the Act, claiming that the maintenance workers were not in its employ and also that its business did not meet the requirements of an "enterprise" within the Act's ambit. The District Court for the Eastern District of Virginia sustained both contentions and dismissed Respondent's complaint. 312 F. Supp. 608, 613 (1970). The Fourth Circuit Court of Appeals reversed on both issues and granted Respondent the requested relief. 439 F.2d 340 (1971).

Writ of certiorari was denied by this Court on October 12, 1971. 404 U.S. 827. After additional district court and appeals court proceedings regarding the appropriateness of prejudgment interest, Petitioner again requested a writ of certiorari. On February 28, 1973, the Court decided *Brennan* v. *Arnheim and Neely, Inc.*, holding that a real estate management company's activities at the different properties it services constitute an "enterprise" within the meaning of the Act. 93 S. Ct. 1138. The Court, in its opinion, stated that the "important" issues of whether a managing agent is an "employer" of the building workers within the meaning of the Act and whether the proper measure

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* The Fair Labor Standards Act of 1938 as amended, 29 U.S.C. §§201 *et seq.*, is referred to as the "Fair Labor Standards Act," the "FLSA," or the "Act."

of the agent's "gross sales" is its gross rentals collected or its gross commissions, were not before it, and announced that it had granted certiorari in *Falk* v. *Brennan* to consider these issues. 93 S. Ct. at 1141, 1143 & n. 8.

Summary of Argument

The principal issue in these proceedings is whether the business of the apartment project owner or that of his managing agent is measured for qualification under the FLSA's minimum dollar and interstate commerce requirements in order to determine whether certain maintenance workers are "employed in an enterprise engaged in commerce or in the production of goods for commerce" and so covered by the Act.

Under the FLSA enterprise concept, the Act applies to the employees of any business within the Act's scope. The FLSA designates every business concern as either covered or exempt. Petitioner's business is arguably covered. The project owners' businesses are both so small and so local as to be exempt.

It is clear from the Act's "history, terms, and purposes" that it is the business of the apartment project owner and his alone, that is measured to determine whether the Act applies to the maintenance workers at his project.

For an "enterprise" to qualify as being "engaged in commerce or in the production of goods for commerce" and so be covered by the Act, it must be large enough to do currently at least two hundred and fifty thousand dollars of business each year. The purpose of this minimum dollar requirement, as the legislative history makes clear, is to

exclude small businesses in order to protect them from the resultant dislocative effects of the Act's application. This objective can be accomplished only if the measuring entity is that business which ultimately bears the labor costs. Here, the workers are paid out of the owner's funds and the owner alone enjoys the profits and suffers the losses from the project's operation. If the measuring entity used is the business of the managing agent who receives a set fee and has no equity in the apartment project, application of the minimum dollar requirement would be a sham. It is the project owner, who stands to suffer the dislocation which the Act's minimum dollar requirement seeks to avoid, whose business must be measured for compliance with that requirement.

The importance of interpreting the minimum monetary requirements so as to carry out the Act's purpose to protect small businesses is demonstrated by the facts of the instant case. A decision that the Act applies to these workers would significantly increase the operating costs and likely drive from business many small entrepreneurs in an industry in which supply already lags alarmingly behind the demand. New York City, for example, is plagued by a major shortage of adequate low and middle income housing. Yet, owners of many such units presently in existence are operating businesses so marginal that any increased labor cost resulting from the FLSA's application could force them out of business. It was Congress' precise intent in exempting such small businesses to protect them, and this Court must not endorse Respondent's attempt to circumvent fulfillment of that purpose.

The Fourth Circuit's mistaken adoption of Respondent's theory resulted from its misunderstanding of the

issue before it. That court failed to distinguish the question of whether an employment relationship exists for coverage purposes from that of whether a business is an "employer" so as to be subject to derivative liability within the meaning of Section 3(d). Thus, it misconstrued FLSA Section 3(d)'s definition of "employer" and decisions holding a managing agent derivatively liable as support for measuring the managing agent's business for coverage purposes. It erroneously assumed that because several different businesses may be "employers" for liability purposes, any of several different businesses may provide the foundation for enterprise coverage of a given employee, no matter how flimsy and tenuous the employment relationship. That assumption is not only unprecedented and destitute of support, it is contrary to the FLSA's distinct implication that only a worker's one actual employment relationship can afford the basis for enterprise coverage.

Furthermore, the Fourth Circuit's decision has the effect of drawing the apartment project owners' exempt businesses under the Act solely as a result of having engaged the services of a large business concern. This result is both unjust and in direct contravention of a Congressional prohibition.

Facts

Drucker & Falk is a property management firm which manages approximately thirty apartment projects, comprised of one and two story apartment buildings, located in various cities in Virginia.* (A. 85).** Each of the proj-

* Drucker & Falk also sells real estate and insurance.

** References to the Appendix to the pleadings in the Fourth Circuit Court of Appeals are identified by "A." followed by the

ects is separately owned, and each of the owners has independently contracted with Petitioner for the latter's services (the "contract"). (A. 16-19, 38-39). These contracts provide generally that Petitioner as the owner's "agent" is to operate and maintain the project on a day-to-day basis, subject to the overall direction and approval of the owner. (A. 85-87, 89-91). The owner in turn agrees to pay Petitioner a set percentage of the gross monthly rental. (A. 87, 101, 109).

Maintenance workers (hereafter the "maintenance workers" or "workers") have been hired at each project to perform the maintenance, repair, alterations and upkeep that the project requires. These workers, whom the contract designates "employees" of their respective project owner, are paid by that owner, through Petitioner as its agent, out of the owner's funds. Each owner carries his workers on his books as employees of his project and carries a separate employer identification number. (A. 85-90). Workers remain at their project even after the owner has terminated Petitioner's services.* † (A. 92).

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appropriate page number(s). References to the Brief filed by Respondent in the Court of Appeals are identified as "Res. Br." All statutory citations herein, unless otherwise identified, are to the Fair Labor Standards Act.

* As a result, some of the workers at issue in this action are presently working at projects that no longer receive Petitioner's services. (A. 93).

† A very small percentage of the workers have been employed at two different owners' projects. Some workers were engaged at two projects at once for efficiency purposes, while a few others changed projects pursuant to promotions. (A. 92-93). These arrangements are not inconsistent with viewing these individuals as the owners' employees in that they would likely evolve as the need dictated even in the absence of a managing agent. Two apartment project owners who could more efficiently share maintenance

The workers at each project include a "project manager" or "maintenance superintendent" who lives on the premises. The maintenance superintendent hires, fires, and supervises the other workers at his project and has the final word in setting their wages. (A. 89). He meets and discusses project needs with the owner during the latter's visits to the apartment project, which may be as often as once a month. (A. 90-91).

Petitioner fulfills its responsibility for the project's maintenance and upkeep through its supervision of the maintenance superintendent. While directly responsible to Petitioner's officials and required to follow Petitioner's policies, each maintenance superintendent is "fairly autonomous because of their demonstrated good judgment and performance." The project owner, on the other hand, provides overall direction to this effort through budgeting, regular visits to the apartment project, and subsequent conferences with the maintenance superintendent and Petitioner's officials. The project owner's semi-annual budget sets specific allowances for maintenance costs such as pay-

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personnel would be expected to do so. A worker who was offered a substantial promotion and salary hike at a project other than his own would likely accept. It is noteworthy that in each of these instances, the owners participated in making the two-project decision. (A. 92-93).

A thorough examination of the facts in these particular cases could reveal that the individuals involved merit special classification. Those who worked for two owners at once may be entitled to have all working hours computed together for overtime purposes under the "joint employer" doctrine. *See* 29 C.F.R. § 791. The circumstances in a few instances could even dictate classifying the workers involved as employees of Petitioner for coverage purposes.

In any event, the significance of this relative handful of exceptions is *de minimis*. The overwhelming majority of the workers at issue in this action have been associated with a single project and project owner throughout the period in question.

roll, painting, grounds maintenance, plumbing, equipment, repair, appliance replacement, etc.* (A. 89-91).

Each project's rent payments and other receipts are collected by Petitioner and deposited in a trust account. Petitioner, as agent for the owner, pays the project's expenses including the payroll and its own fee out of that account, providing the owner with a detailed list of disbursements. (A. 86; Res. Br. 7). The balance, if any, is returned to the owner and any deficit in the account must be made up by the owner. In sum, any profit or loss from a project's operation is solely the owner's. Petitioner has no equity in the project and receives the identical fee regardless of profit or loss.** (A. 86-87, 101, 109).

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* In addition to its responsibility for maintenance and upkeep, Petitioner also provides management and rental services. Thus, it collects rents, seeks to let vacant apartments and tends to other administrative details. These tasks are carried out directly by Petitioner's personnel in some instances and by the individual project owner's personnel, under Petitioner's supervision, in others. The personnel who provide these services are not at issue in this action.

** The typical contract between managing agents and apartment building owners in the City of New York differs from these contracts in the following significant respects:

(1) Very rarely does a building service employee work on the premises of two different buildings.

(2) Each building's rent payments and other receipts are usually kept in a separate bank account and never intermingled with the revenues of any other building managed by that agent.

(3) Very rarely do a managing agent's personnel provide "management and rental services," such as collecting rent and letting vacant apartments, on the premises.

(4) Most building service workers are organized, and, in each building, contract through their representative union

I.

THE ACT DOES NOT APPLY TO THE MAINTENANCE WORKERS BECAUSE THEY ARE THE EMPLOYEES OF THE APARTMENT PROJECT OWNERS WHOSE BUSINESSES ARE EXEMPT FROM THE FLSA's APPLICATION.

A. *The Individual Apartment Project Owners' Businesses Being So Small and Local That They Are FLSA-Exempt, the Act Does Not Apply to the Workers if They Are in the Owners' Employ.*

The Fair Labor Standards Act of 1938, as originally enacted, applied only to individual employees who were themselves "engaged in commerce or in the production of goods for commerce." P.L. 75-718, §§6(a), 7(a), 52 Stat. 1062, 1063. In 1961, the Act was amended to cover "certain large enterprises engaged in commerce or in the production

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(either Local 32B or Local 32E, Service Employees International Union, AFL-CIO) with the owner of their respective building regarding their terms and conditions of employment. (Even a landlord who owns two or more buildings must have a separate agreement for the workers at each.)

Under these agreements, such terms as length of vacation, amount of termination pay, order of layoff, and order of entry into more desirable jobs depend on the worker's seniority at that particular building. A worker who changes buildings loses all his seniority. Finally, these agreements are not terminated by a change of managing agent; only a change in ownership necessitates negotiating a new agreement. (*See, e.g.*, Collective Bargaining Agreement Between Realty Advisory Board on Labor Relations, Inc., and Local 32B Service Employees International Union, AFL-CIO, effective April 21, 1973 through April 20, 1976.)

If the Court does conclude that the workers at issue here are Petitioner's employees for coverage purposes, it should limit its holding to the facts before it in order to avoid unwarranted effects on other, more typical relationships between apartment building owners and managing agents.

of goods for commerce." S. Rep. No. 145, 87th Cong., 1st Sess., 24-25 (1961). Under the Act's "enterprise" approach, if a business was sufficiently large and involved in interstate commerce to satisfy the coverage criteria in Section 3(s), all that business' employees were subject to the Act.*

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* FLSA Sections 6 and 7, the minimum wage and maximum hour provisions, now provide in pertinent part:

> "Sec. 6. (a) Every employer shall pay to *each of his employees who* in any workweek is engaged in commerce or in the production of goods for commerce, or *is employed in an enterprise engaged in commerce or in the production of goods for commerce,* wages at the following rates:
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> . . .
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> "Sec. 7. (a)(1) Except as otherwise provided in this section, no employer shall employ *any of his employees who* in any workweek is engaged in commerce or in the production of goods for commerce, or *is employed in an enterprise engaged in commerce or in the production of goods for commerce,* for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." (Emphasis added.)

An "enterprise engaged in commerce or in the production of goods for commerce" is defined in pertinent part as follows:

> "'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—
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> (1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) . . . , and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated); . . . ." (Section 3(s))

Respondent contends that the workers at issue fall within the FLSA's ambit because they are employed by such a business. (A. 7-8; Res. Br. 7-8).

Section 3(s) provides generally that a concern such as an apartment project or a property management firm is covered only if it satisfies two requirements:

> (1) the business has two or more employees engaged in commerce or in the production of goods for commerce; and
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> (2) the business did an annual business of at least $500,000 during the period 1967-69 and at least $250,000 from 1969 on.

Petitioner's business is arguably covered by the FLSA. The businesses of the individual apartment project owners clearly are not covered. (Respondent admits that the individual apartment project owners' businesses are too small and too local to qualify for FLSA coverage.)* (A. 87). The central question presented by this case is which of these two businesses—the apartment project or the managing agent—should be measured for qualification under the FLSA's requirements in determining whether these workers come under the enterprise coverage blanket.

B. *The History, Terms and Purposes of the FLSA Make It Clear That the Workers Are Employed by the Owners and Not Petitioner.*

The FLSA's definitions are not helpful in determining which of two independent businesses a worker is "employed" by and so which should be measured for qualifica-

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* Although one of the individual owner's projects apparently has qualified for coverage since 1967 and several others have qualified since 1969, the workers at these projects have been paid in accordance with the FLSA and so are not at issue in this action. (A. 93-94).

tion as an "enterprise engaged in commerce or in the production of goods for commerce." "Employ" is defined to "include to suffer or permit to work" (§3(g)); "employee" is defined in pertinent part to "include any individual employed by an employer" (§3(e)); and "employer" in pertinent part to "include any person acting directly or indirectly in the interest of an employer in relation to an employee" (§3(d)). The courts have repeatedly held that these broad, vague statutory definitions do not serve as a meaningful guide to determine the existence or non-existence of an employment relationship. *E.g., Rutherford Food Corp.* v. *McComb,* 331 U.S. 722, 728-31 (1947); *Walling* v. *Portland Terminal Co.,* 155 F.2d 215, 217-20 (1st Cir. 1946), *aff'd,* 330 U.S. 148 (1947); *Walling* v. *Sanders,* 136 F.2d 78, 81 (6th Cir. 1943); *Helena Glendale Ferry Co.* v. *Walling,* 132 F.2d 616, 620 (8th Cir. 1942); *Bowman* v. *Pace Co.,* 119 F.2d 858, 860-61 (5th Cir. 1941). As this Court has stated in regard to these definitions, ". . . there is in the Fair Labor Standards Act no definition that solves problems as to the limits of the employer-employee relationship under the Act." *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722, 728 (1947).

The Fourth Circuit, in its decision below, confused the issue of whether Petitioner is an "employer" so as to be subject to derivative liability* within the meaning of Section 3(d)** with that of whether Petitioner is the

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* A defendant is "derivatively liable" when its liability arises not from its relationship to the plaintiff but rather from its relationship to an already-liable defendant. *See, e.g., Shultz* v. *Chalk-Fitzgerald Construction Co.,* 309 F.Supp. 1255, 1257 (D. Mass. 1970).

** Section 3(d) provides as follows:

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an em-

workers' employer for coverage purposes. 439 F.2d at 345. While it may seem unusual to contend that an "employer" is not "employing" the workers in question, two different statutory provisions are being discussed, each with a different objective. Section 3(s), defining an "enterprise engaged in commerce or in the production of goods for commerce," sets forth the minimum standards necessary for a business to be subject to the minimum wage and maximum hour provisions of Sections 6 and 7. Section 3(d), defining the term "employer," provides that for businesses that are in fact subject to Sections 6 and 7, the responsibility to comply with the Act can fall upon several different persons as "employers."

As has often been recognized, it is one thing to determine whether a party comes within the Act's broad definition of "employer"; it is quite another to determine whose business to look to for determining whether the workers at issue are employed by an enterprise that satisfies the requirements of dollar amount of business done and nexus with interstate commerce for the FLSA to apply. *See Hodgson* v. *Royal Crown Bottling Company*, 324 F. Supp. 342, 346, 347 (N.D. Miss. 1970), *aff'd*, 465 F.2d 473 (5th Cir. 1972); *Shultz* v. *Isaac T. Cook Company*, 314 F. Supp. 461, 466-67 (E.D. Mo. 1970); *Wirtz* v. *Country Club Acres, Inc.*, 18 WH Cases 627 (N.D.N.Y. 1968), *aff'd*, 19 WH Cases 559

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ployee but shall not include the United States or any State or political subdivision of a State (except with respect to employees of a State, or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (2) in the operation of a railway or carrier referred to in such sentence), or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

(2d Cir. 1969); *Mungovan* v. *Manierre*, 7 L.C. ¶61,646 (N.D. Ill. 1943). *See also Hodgson* v. *Servomation-Ajax Co.*, 323 F. Supp. 1047 (N.D. Miss. 1971). Section 3(d) was evidently formulated so broadly in order to facilitate the Act's enforcement. *See Brennan* v. *Community Service Society of New York*, 7 L.C. ¶61,745 at 65,130 (N.Y. City Ct. 1942).

When Congress has failed to "explicitly define" a term such as "employ," the question whether the workers at issue are employed by a particular business

> ". . . must be answered primarily from the history, terms and purposes of the legislation. The word ['employee'] 'is not treated by Congress as a word of art having a definite meaning. . . .' Rather 'it takes color from its surroundings . . . [in] the statute where it appears,' *United States* v. *American Trucking Assns.*, 310 U.S. 534, 545, and derives meaning from the context of that statute, which 'must be read in the light of the mischief to be corrected and the end to be attained.' *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251, 259; *cf. New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552; *Drivers' Union* v. *Lake Valley Co.*, 311 U.S. 91." *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 120, 124 (1944).

The significance of which business each worker is employed by, is that Respondent rests its claim that the FLSA applies to these workers on its argument that they are all "employed in an enterprise engaged in commerce or in the production of goods for commerce." To qualify as such in any year, a business has to meet the minimum dollar requirement for that year.* Petitioner's business ar-

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* The minimum dollar requirement for qualification as a "business engaged in commerce or in the production of goods for commerce" in any given year is:

guably meets the minimum dollar qualification for every year since and including 1965; the owners' businesses do not qualify for any year.* Thus, the Act's application to these workers turns on whether the dollar size of Petitioner's or each owner's business is considered. A review of the "history, terms and purposes" of the FLSA makes it abundantly clear that when Congress made it a prerequisite for the coverage of these workers that the business in which they are "employed" be an "enterprise engaged in commerce or in the production of goods for commerce," it was talking about the business of each owner and not Petitioner's business.

The FLSA's dollar requirement appears on its face to be intended to protect small businesses. This interpretation receives overwhelming support from the Senate Report that accompanied the 1961 amendment that first added "enterprise" coverage and the dollar requirement to the Act. Fair Labor Standards Amendments of 1961, P.L. 87-30, 75 Stat. 65.** In an initial summary section, the

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1962–66	$1,000,000 in "annual gross volume of sales" (Fair Labor Standards Amendments of 1961, P.L. 87-30, §2(c), 75 Stat. 65)
February 1, 1967–January 31, 1969	$500,000 in "annual gross volume of sales made or business done" (FLSA §3(s))
February 1, 1969	$250,000 in "annual gross volume of sales made or business done" (FLSA §3(s))

* See footnote at p. 11, *supra*.

** The requirement that a business do at least a million dollars in sales to be an "enterprise engaged in commerce or in the production of goods for commerce" was contained in a bill proposed by the Kennedy Administration. Then Secretary of Labor Arthur Goldberg spoke in support of the bill before a subcommittee of the House Education and Labor Committee. Hearings on H.R. 3935 Before the Special Subcommittee on Labor of the House Committee on Education and Labor, 87th Cong., 1st Sess., 4 (1961). His remarks regarding the purpose of the proposed minimum dollar

Report clearly sets forth the purpose of the Act's requirement that a business have an "annual gross volume of sales" of at least $1,000,000 (presently $250,000) in order to qualify as an "enterprise engaged in commerce or in the production of goods for commerce":

> "Finally, the million dollar test in the committee bill is not the constitutional standard for coverage. The constitutional standard for coverage is contained in these requirements which have just been discussed. The million dollar test is an economic test. It is the line which the Congress must draw in determining who shall and who shall not be covered by a minimum wage. It is a way of saying that anyone who is operating a business of that size in commerce can afford to pay his employees the minimum wage under this law." S. Rep. No. 145, 87th Cong., 1st Sess., 5 (1961).*

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requirement for retail and service stores included the following statement:

> "We are covering, or proposing that we cover, large stores, large chainstores. We are proposing to cover—and we use the term 'an enterprise' for that purpose—an enterprise which has through its one or more constituent units, related units—in other words, if they are in the grocery business, grocery stores, markets—which have annual sales of more than a million dollars a year, and that has to be a pretty substantial store or enterprise. We are not talking about the small family store and I do not know why these small stores get involved in this and are concerned about this.
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> And you may be interested in knowing how many establishments we are seeking to cover, how many enterprises we are seeking to cover. There are hundreds of thousands of small stores throughout the United States. We are only proposing to cover in our retail and service coverage 15,000 enterprises. That is all. That shows you the magnitude of these enterprises, with 100,000 establishments. In other words, for a country as large as ours, we are dealing with a relatively small number of enterprises, 15,000 enterprises. And in the 15,000 enterprises there are 100,000 establishments doing this volume of business."

Id. at 23.

* The remainder of the Report contains numerous additional statements indicating that the dollar limit was intended to protect

This Court recently reached the same conclusion, finding that "it is true that one purpose of the dollar volume limitation in the statutory definition of 'enterprise' is the exemption of small businesses." *Brennan* v. *Arnheim and Neely, Inc.*, 93 S. Ct. 1138, 1143 (1973).

Once it has been established that the purpose of the minimum dollar requirement is to avoid economic dislocation of small businesses, it becomes readily apparent what the FLSA means by *"employed* in an enterprise engaged in commerce or in the production of goods for commerce." (Emphasis added.) An effect of extending the FLSA's application to a group of employees is to increase the cost of the work they perform. In order for the Act's dollar requirement and the exemption it affords small business to be effective, a worker must be *"employed"* by that business which will suffer those increased costs.

If the FLSA were extended to cover the workers at issue here, the increased cost would be borne solely by the owners. According to Petitioner's contract with each apartment project owner, Petitioner collects the rent, pays the building's expenses, including its own fee and

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small businesses. *Id.* at 25 (l. 12-15); 27 (l. 8-21); 31 (l. 15-23); 41 (l. 35-38). *See id.* at 77 (l. 29-44); 99 (l. 10-48) (minority views of Senators Barry Goldwater and Everett M. Dirksen). Significantly, a review of the Senate, House and Conference Reports that accompanied both the 1961 and the 1966 amendments reveals nothing indicating that the protection of small businesses was not the purpose of the minimum dollar requirement. *See* Conf. Rep. No. 327, 87th Cong., 1st Sess. (1961); S. Rep. No. 145, 87th Cong., 1st Sess. (1961); H.R. Rep. No. 75, 87th Cong., 1st Sess. (1961); Conf. Rep. No. 2004, 89th Cong., 2d Sess. (1966); S. Rep. No. 1487, 89th Cong., 2d Sess. (1966); H.R. Rep. No. 1336, 89th Cong., 2d Sess. (1966).

the payroll out of it, and gives the balance of the funds, if any, to the owner. (A. 86; Res. Br. 7). Any profit or loss from the project's operation is solely the owner's. Petitioner's income will remain the same whether the Act is held applicable to these workers or not.* (A. 86-87, 101, 109).

Therefore, the term "employed in an enterprise engaged in commerce or in the production of goods for commerce" must mean the apartment project owner. Any other interpretation would make a sham of the Fair Labor Standards Act's clear purpose to protect this nation's small businesses. The effect on the apartment project owners of the Fourth Circuit's holding that their maintenance workers are the managing agent's employees and are thereby subject to the Act, is virtually identical to that if these owners were to lose their exemptions.

C. *The Existing Case-Law Supports the Conclusion That the Workers Are Employed by the Owners and Not Petitioner.*

In *Hodgson* v. *Arnheim and Neely, Inc.*, 444 F.2d 609, 612 (1972), *rev'd on other grounds*, 93 S. Ct. 1138 (1973), the Third Circuit held that in the circumstances of that case, the maintenance workers were the employees of the managing agent.

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* The Fourth Circuit's statement that "rental agencies, such as defendants here . . . are [not] the sole beneficiaries of the underpayment of [the maintenance workers'] wages," implying that Petitioner does benefit from such "underpayments," is incorrect. 439 F.2d at 345. Petitioner's sole compensation for its services is a fixed percentage of the gross rentals. (A. 87, 101, 109). An increase in the pay to maintenance workers would, if anything, benefit Petitioner in providing a more competent and responsible workforce.

Apart from that decision (which it will be demonstrated below was in error (see p. 28, *infra*)), the existing precedent uniformly supports the conclusion that the workers are employed not by Petitioner but by the individual owners. The first reported decision was *Mungovan* v. *Manierre* in which a building service worker's action against the managing agent to recover overtime was dismissed, holding that the building owner and not the agent was the plaintiff's employer. 7 L.C. ¶61,646 (N.D. Ill. 1943).

Subsequently, the Federal District Court for the Southern District of New York found a building owner principally liable in an action by maintenance workers for unpaid overtime compensation. *Greenberg* v. *Arsenal Building Corporation*, 50 F. Supp. 700 (S.D.N.Y. 1943). The court also held the managing agent derivatively liable under Section 3(d) as a result of having acted as the owner's, the actual employer's, agent or representative. 50 F. Supp. at 703. The Second Circuit affirmed, concluding that if Section 3(d) were not construed to make the managing agent derivatively liable, "the section would have little meaning or effect." 144 F.2d 292, 294 (1944), *rev'd in part on other grounds sub nom. Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945).

The same result was reached in another suit by maintenance workers to recover unpaid overtime compensation. *Asselta* v. *149 Madison Avenue Corporation*, 65 F. Supp. 385 (S.D.N.Y. 1945), *aff'd*, 156 F.2d 139 (2d Cir. 1946), *aff'd*, 331 U.S. 199 (1947). The trial court found the building owner principally liable as the actual employer and then held the managing agent derivatively liable as the employer's agent:

> "An agent who acts in the interest of an employer in relation to an employee is liable as an 'employer' for sums owed by the owners. 29 U.S.C.A. §203(d); Greenberg v. Arsenal Building Corp., 144 F.2d 292." 65 F. Supp. at 389.

See also Fleming v. *Arsenal Building Corporation*, 125 F.2d 278 (2d Cir. 1941) (L. Hand), *rev'g* 38 F. Supp. 207 (S.D.N.Y. 1941), *aff'd sub nom. A. B. Kirschbaum Co.* v. *Walling*, 316 U.S. 517 (1942) (Action by building service workers for overtime pay. "(We may ignore the defendant [managing agent] for any decision as to it must concededly follow that as to [the building owner], of which we shall speak as the defendant.)")*

More recently, the Sixth Circuit determined the Act's application to a group of maintenance workers by measuring the business of the building's owner, despite the presence of a managing agent who supervised the workers' day-to-day activities. *Wirtz* v. *Columbian Mutual Life Insurance Company*, 380 F.2d 903, 905 (1967), *aff'g* 246 F. Supp. 198 (W.D. Tenn. 1965). The court determined that the Act was applicable and proceeded to hold the owner directly liable.**

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* That the courts in *Greenberg*, *Asselta*, and *Fleming* did find the managing agent derivatively liable for the building owner's violations in no way supports Respondent's position. One court described the relationship between the employee and the derivatively-liable employer as follows:

> "As to such person [the derivatively liable 'employer'], liability is predicated not on the existence of an employer-employee relationship between him and the employee but on the acts he performs in the interest of the employer in relation to the employee." *Shultz* v. *Chalk-Fitzgerald Construction Co.*, 309 F.Supp. 1255, 1257 (D. Mass. 1970).

** The district court below properly relied on *Columbian Mutual* in concluding that the workers were not employees of the agent. 312 F.Supp. at 613. The Fourth Circuit, in reversing that finding,

Every one of these decisions held the owner the actual employer and the managing agent, at most, a derivative-statutory employer. As the finding of liability in each was based on the premise of the building owner's primary liability, adoption of Respondent's theory would cast doubt on the viability of these decisions and may require their reversal.*

D. *The Fourth Circuit's Decision That Petitioner and Each Owner Can Be Joint Employers for Coverage Purposes Is an Unprecedented and Ill-Advised Extension of the Joint-Employer Doctrine and Contravenes Clear Congressional Intent.*

In its opinion below, the Fourth Circuit concluded that Petitioner and each apartment project owner could be "joint employers for purposes of the Act." 439 F.2d at 345. As a result, the court found it unnecessary to decide which of the two businesses should be measured to determine whether the Act is applicable. The Sixth Circuit Court of Appeals' decision that the owner's business should be measured,** relied on by the district court, was distinguished on the ground that the joint-employer doctrine makes the Act applicable to such workers if either the owner's or the managing agent's business is covered by the Act. 439 F.2d at 345 n.10.

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purported to distinguish *Columbian Mutual* on the ground that the workers may be jointly employed. 439 F.2d at 345 n.10. In doing so, the Fourth Circuit misunderstood the holding in *Columbian Mutual* and misapplied the joint-employer doctrine. See pp. 21-23, *infra*.

* If the managing agent in each of these cases were the party allegedly primarily liable, it would be able to assert defenses unavailable to it as a derivatively-liable defendant.

** *Wirtz* v. *Columbian Mutual Life Insurance Company*, 380 F.2d 903 (1967), *aff'g* 246 F.Supp. 198 (W.D. Tenn. 1965).

Such an application of the joint-employer doctrine demonstrates a misunderstanding of both the doctrine and of the FLSA's enterprise-coverage concept. According to the Department of Labor's own regulations, the consequence of joint employment is to require treating an FLSA-covered employee's work for two or more different employers as arising out of a single employment relationship. 29 C.F.R. § 791. The regulations state, in pertinent part, as follows:

> "If all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the act. On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the act. *In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions, with respect to the entire employment for the particular workweek.*" 29 C.F.R. §791.2. (Emphasis added.) (Footnotes omitted.)

In other words, the joint-employment doctrine is pertinent only once FLSA coverage is found to be present. It is irrelevant to the threshold question whether a business is covered by the FLSA.

Never before has this doctrine been used as a short-cut to determine that a business enterprise is covered by the FLSA.* The vast majority of joint-employer cases that have arisen under the Act have involved combining a covered employee's hours worked for two different but associated employers so as to make the Act's overtime provisions applicable. *E.g., Mid-Continent Pipe Line Co.* v. *Hargrave,* 129 F.2d 655 (10th Cir. 1942); *Durkin* v. *Waldron,* 130 F.Supp. 501 (W.D. La. 1955).**

E. *The Fourth Circuit's Erroneous Decision That Petitioner's Business Is Measured to Determine the FLSA's Application to These Workers Resulted From That Court's Misunderstanding of the Issue Before It.*

The FLSA as administered contains several features that facilitate its enforcement. The broad definition of "employer" assists a covered employee in finding a party who can be held responsible for his actual employer's wrongdoing. The judicially-developed joint-employer doc-

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* Respondent, in its brief below in the court of appeals, cited a case in which the District of Columbia Circuit Court held that a management company was a joint employer with the building owner within the meaning of the National Labor Relations Act and so could be required to bargain with the union representing the maintenance employees. *Herbert Harvey, Inc.* v. *NLRB,* 385 F.2d 684 (D.C. Cir. 1967), 424 F.2d 770 (D.C. Cir. 1969). While "decisions that define the coverage of the employer-employee relationship under the [NLRA] are persuasive in the consideration of a similar coverage under the [FLSA]" (*Rutherford Food Corp.* v. *McComb,* 331 U.S. 722, 723 (1947)), the issue decided in *Harvey* was so completely different from the instant controversy as to make that decision absolutely irrelevant to these proceedings.

** *Mid-Continent Pipe Line Co.* v. *Hargrave* and *Durkin* v. *Waldron* were cited by the Fourth Circuit in its argument that the apartment project owners and Petitioner may be treated as joint employers in determining worker coverage under the Act. 439 F.2d at 345.

trine prevents an employer's sidestepping the Act's overtime provisions through the guise of a second job. Thus, in the office building and apartment building industries, courts have held that maintenance workers who are covered by the Act can sue both the building owner as their actual employer and the managing agent as the derivative-statutory employer to recover relief due them under the Act. *Asselta* v. *149 Madison Avenue Corporation*, 65 F.Supp. 385 (S.D.N.Y. 1945), *aff'd*, 156 F.2d 139 (2d Cir. 1946), *aff'd*, 331 U.S. 199 (1947); *Greenberg* v. *Arsenal Building Corporation*, 50 F.Supp. 700 (S.D.N.Y. 1943), *aff'd*, 144 F.2d 292 (2d Cir. 1944), *rev'd in part on other grounds sub nom. Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945).

The Fourth Circuit, in deciding the threshold issue of whether the FLSA applies to a particular business, made the mistake of relying on statutory provisions and judicial precedents which facilitate the FLSA's enforcement but which are irrelevant to the question of the Act's application. Thus, the Fourth Circuit, in determining the Act's application to these workers, decided whether to measure Petitioner's business for coverage, on the basis of whether Petitioner came within the Act's broad definitions of "employer," "employ," and "employee":

> "We, therefore, have no doubt that defendants act 'directly or indirectly in the interest of an employer in relation to an employee' and that the maintenance workers are 'employees' of, and 'employ[ed]' by, defendants within the statutory definition of the Act." 439 F.2d at 345.

The court found it unnecessary to decide whether the apartment project owner's exempt business or Petitioner's

covered business was at issue because it could call the two "joint employers" and avoid having to choose betwen them:

> "Courts have also found that workers could have joint employers for purposes of the Act. See Mid-Continent Pipe Line Co. v. Hargrave, 129 F.2d 655 (10th Cir. 1942); Durkin v. Waldron, 130 F. Supp. 501 (W.D. La. 1955).
>
> "The Second Circuit has held that rental agents may be employers, jointly with the building owners." *Id.* (Footnote omitted.)

The Sixth Circuit's decision that the building owner's business was measured to determine maintenance worker coverage,* which the court below had followed in finding the workers employees of the apartment project owners,** was distinguished on the ground that the joint-employer doctrine affords the alternative of measuring either the owner's or the agent's business. 439 F.2d at 345 n.10.

The decisions in *Greenberg* v. *Arsenal Building Corporation* and *Asselta* v. *149 Madison Avenue Corporation* were relied on by the court to support its conclusion — decisions which not only do not stand for the proposition asserted, but rather support the contrary proposition that the *actual* employer of the maintenance workers is the individual apartment project owner and not the managing agent. See pp. 18-21, *supra*.

Furthermore, the conclusion reached by the Fourth Circuit — that a flimsy and tenuous employment relationship

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* *Wirtz* v. *Columbian Mutual Life Insurance Company*, 380 F.2d 903 (1967), *aff'g* 246 F.Supp. 198 (W.D. Tenn. 1965).

** 312 F.Supp. at 613.

between a worker and his employer's agent is sufficient foundation for enterprise coverage — is contrary to "the history, terms and purposes of the legislation." *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 124 (1944). The Act classifies each of this nation's businesses as either covered or exempt — distinctly implying the absence of the intermediate category suggested by Respondent: "exempt unless you do business with a covered enterprise which acts as your agent *vis-a-vis* your employees."* *See* Sections 3(d), 3(r), 3(s), 6 and 7; S. Rep. No. 145, 87th Cong., 1st Sess., 2-5, 24-34, 40-45 (1961); H.R. Rep. No. 75, 87th Cong., 1st Sess., 7-15, 34-37 (1961).** The Act and the legislative history deal generally with the problem of determining, for coverage purposes, which of two independent business concerns having a close business relationship, is the actual employer in a given case — directing how to decide that it is one or the other, but never that the problem be solved by treating both concerns as the employer. Section 3(r) [proviso]; S. Rep. No. 145, 87th

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* If the FLSA were held applicable to these maintenance workers as Petitioner's employees, the effect on the apartment project owners would be virtually identical to that if the owners were to lose their exemptions.

** For example, the 1961 Senate Report states:

"In general, if an enterprise comes within one of the six categories, all of its employees are covered under the bill regardless of their duties. However, there are express exclusions under which specified employees, establishments, and enterprises would be exempt from the act's minimum wage and overtime provisions, and still others would be exempt from the overtime provisions only." *Id.* at 25.

"Ample provision is made in the bill to insure that the original intent of the sponsors of the act to exclude the small local retail merchants such as the corner grocer, neighborhood drugstore, barbershop or beauty parlor is carried out. Not only must the enterprise have $1 million in sales annually but, as noted else-

Cong., 1st Sess., 40-42 (1961). Neither the Act nor the legislative history contains a shred of support for Respondent's novel theory of statutory interpretation.*

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where in the report, there are other tests to insure that the covered enterprises will be substantially engaged in interstate commerce." *Id.* at 27.

"The bill also contains provisions which should insure that a small local independent business, not in itself large enough to come within the new coverage, will not become subject to the act by being considered a part of a large enterprise with which it has business dealings." *Id.* at 41.

"The committee bill extends coverage to additional employees only in enterprises which have employees engaged in commerce or in the production of goods for commerce, and contains provisions designed to assure that the engagement in interstate commerce activities is substantial." *Id.* at 43.

"To insure that the bill's new coverage in the retail field will reach only those enterprises which are substantially engaged in interstate activities, the bill contains a further test. Retail selling and servicing enterprises covered by section 3(s)(1) as proposed in the bill will not only have employees engaged in commerce or in the production of goods for commerce, and gross $1 million or more annually, exclusive of specified taxes, but will also purchase or receive goods for resale that move or have moved across State lines (not counting movements in deliveries from the reselling establishment) which amount in total annual volume to $250,000 or more.

"This volume of purchase and receipts of interstate commerce goods, together with the gross annual sales volume of $1 million or more exclusive of specified taxes, should provide more than adequate assurance that the newly covered enterprises will be those plainly engaged to a substantial extent in interstate commerce and should make it abundantly certain that no small local business will be affected." *Id.* at 43-44. (The bill reported by the Senate Labor and Public Welfare Committee contained a coverage requirement, subsequently removed by the conference committee, that an establishment have done a minimum business in goods that move across state lines).

* Congress, in amending the Act to include enterprise coverage, was careful not to exceed its constitutional power to "regulate Commerce . . . among the several States. . . ." U.S. Const. Art. I, §8. *See Maryland* v. *Wirtz*, 269 F.Supp. 826, 835 n. 14 (three judge court) (1967), *aff'd*, 392 U.S. 183 (1968). By exempting businesses that either were not large or that lacked workers en-

In sum, as a result of its misunderstanding the issue and following inapplicable statutory provisions and judicial precedents, the Fourth Circuit never came to grips with the real question before it—whether the business at issue was the individual apartment project owner's exempt concern or the managing agent's FLSA-covered enterprise.*

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gaged in interstate commerce, it sought to assure that only concerns having a substantial effect on interstate commerce would be affected. Section 3(s). *See* S. Rep. No. 145, 87th Cong., 1st Sess., 3-5, 42-45 (1961). Respondent seeks now to subvert this scheme by proposing to expand the Act's coverage through the stratagem of interpreting the FLSA as requiring only a flimsy and tenuous relationship between a worker and his employer's agent as a basis for enterprise coverage. It is plain from a reading of the Act and the legislative history that Congress never anticipated that enterprise coverage be given such broad reach. The coverage criteria that Congress so carefully and deliberately formulated to assure the requisite affect on interstate commerce, were adopted on the assumption that the Act would apply to a worker only if his *actual* employer was covered.

An FLSA construed as Respondent proposes may exceed Congress' power and so be unconstitutional. At a minimum it would contravene Congress' explicit decision as to the appropriate limit of its exercise of the commerce power in the context of this legislation.

* The Third Circuit's approach in *Hodgson* v. *Arnheim and Neely, Inc.*, 444 F.2d 609 (1972), *rev'd on other grounds*, 93 S. Ct. 1138 (1973), was similarly incorrect. The court relied on *Greenberg* v. *Arsenal Building Corporation* as standing for the proposition that the managing agent was the actual employer (444 F.2d at 611), found that individual building owners and the managing agent could both be employers for coverage purposes (444 F.2d at 611-12), and concluded that the managing agent's business was to be measured on the ground that it fit within the FLSA's definition of an "employer":

> "Since the Company [the managing agent] hires these employees and provides the conditions of their employment, it appears that the Company is 'acting directly or indirectly in the interest of an employer in relation to an employee.' The District Court correctly decided that the Company was an 'employer' of the various persons working at the buildings, as such term is defined by the Act." 444 F.2d at 612.

The Third Circuit considered the small business exemption but only as it related to whether the managing agent was an "enterprise" under the Act. 444 F.2d at 612-13.

The court never considered the FLSA's objective to protect small businesses and the necessity of construing the Act consistently with that objective.*

F. *This Court Should Reject Respondent's Novel Theory of Statutory Interpretation as Contrary to the Manifest Intent of Congress.*

Respondent is asking this Court to construe the FLSA so as to extend enterprise coverage on the basis of something less than an employment relationship. While this Court has the authority to adopt Respondent's novel and unprecedented theory and thereby expand the FLSA's reach, such a step would be ill-advised. Congress, in amending the FLSA, has carefully and deliberately mapped out which businesses are to be covered and which exempt. It specifically provided in the Act for the exemption of local businesses and for the exemption of small businesses. Respondent is asking that Congress' exemptions be judicially abrogated through the stratagem of a novel statutory interpretation that is destitute of support and contrary to judicial precedents.

Under the facts of this case, such an extension would contravene and nullify the express Congressional intention to protect small businesses. A holding here that the workers are employees of Petitioner for coverage purposes, would amount to a judicial taking away from the apartment project owners of a protection clearly afforded them by Congress under the Act.

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* The Fourth Circuit did recognize that it was relevant to its determination which party would bear the cost of higher maintenance worker wages. But it incorrectly concluded that part of that cost would be borne by Petitioner. 439 F.2d at 345.

II.

THE FOURTH CIRCUIT'S DECISION HAS THE EFFECT, IN CONTRAVENTION OF CONGRESSIONAL INTENT, OF DRAWING THE OWNERS' SMALL BUSINESSES UNDER FLSA COVERAGE SOLELY BECAUSE THEY HAD BUSINESS DEALINGS WITH A LARGE ENTERPRISE.

The operation of a typical apartment house requires the employment of one or more workers to provide basic services. Common areas and passageways must be kept clean, utilities provided, and the building generally maintained in good repair. In a small building or project, these tasks can be performed by one man working twenty hours a week or less; often it is done by a single superintendent who lives on the premises. A larger building or project may require a dozen or more, working full time, including one who is in charge of the operation.

However many service or maintenance workers a particular building has, they require supervision. A landlord can provide such supervision in either of two ways —by undertaking the job himself or by engaging a building management company or agent to do it for him. The agent typically requires payment of a set fee, as opposed to taking an equity interest in the building, in return for which it agrees to manage the operation of the building on a day-to-day basis subject to the owner's overall direction and approval. The use of an agent is often the more efficient of the two alternatives.

The effect of the Fourth Circuit's decision is to make the application of the FLSA to these maintenance workers turn

on whether the building owner hires a managing agent to supervise them. That an owner who presently has an agent could avoid coverage merely by dismissing the agent and taking over the supervision of these services himself, testifies to the fundamental unsoundness of this decision.

More important, the result reached by the Fourth Circuit contravenes a clear congressional intent that a business exempt from the FLSA should not be drawn under the Act's coverage simply as a result of dealing with a larger enterprise. The Senate Report accompanying the 1961 amendments that added enterprise coverage to the Act, stated the following in regard to various exemptions contained in Section 3(r):

> "The bill also contains provisions which should insure that a small local independent business, not in itself large enough to come within the new coverage, will not become subject to the act by being considered a part of a large enterprise with which it has business dealings.
>
> "The definition of 'enterprise' expressly makes it clear that a local retail or service establishment which is under independent ownership shall not be considered to be so operated and controlled as to be other than a separate enterprise because of a franchise, or group purchasing, or group advertising arrangement with other establishments or because the establishment leases premises from a person who also happens to lease premises to other retail or service establishments. For example, a retail establishment will not become part of an enterprise which operates a shopping center merely because it rents its establishment from the shopping center operator." S. Rep. No. 145, 87th Cong., 1st Sess., 41.

As the Third Circuit stated in *Hodgson* v. *Arnheim and Neely, Inc.*, this passage from the Senate Report makes "manifest" "the legislative intent to exclude for purposes of the Act separate businesses which use common service organizations." * 444 F.2d at 614.

To penalize these apartment project owners for engaging Petitioner's services would not only be manifestly unfair, it would be a perversion of what Congress intended in adding enterprise coverage to the Act.

III.

AFFIRMANCE OF THE DECISION BELOW WOULD HAVE AN ADVERSE IMPACT ON AN ALREADY DEPRESSED INDUSTRY.

When the FLSA was originally enacted in 1938, Congress limited both the businesses and employees covered under its provisions. While subsequent amendments extended coverage, Congress exercised caution to continue the exclusion for certain businesses. One such exclusion was for small businesses, defined in terms of annual gross volume of sales.** This protection is consistent with the special protection and exclusion from governmental regulation long recognized by Congress and governmental agencies. *See, e.g.*, Small Business Act as amended, 15 U.S.C. §§631 *et seq.*

The adoption of Respondent's theory that the managing agent's business is the measuring entity for coverage would destroy the small business exemption for the apartment

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* This Court, in reversing the *Arnheim* decision, did not take issue with this finding. 93 S. Ct. 1138, 1142-43.

** See footnote at p. 15, *supra*.

house industry. The economic burden of increased labor costs is borne directly and solely by the owner—the small businessman—not the managing agent. To group together all of these small independent businessmen who individually would not be covered under the FLSA merely because they use a common service, the managing agent, would circumvent the congressional intent to protect these businesses.

Application of the FLSA to owners of buildings through the median of managing agents will result in the very dislocation Congress sought to prevent. Significant numbers of apartment buildings are either marginally profitable or operate at a loss. As a result, the number of buildings abandoned has been steadily increasing in major cities, creating a critical housing shortage, especially in the poor and lower middle income sections. Kristof, *Economic Facets of New York City's Housing Problems* at 23 (1970).

New York City, like other large cities, is faced with an acute housing shortage. Studies indicate that one of the primary causes of this shortage is the consistent abandonment of buildings because of increased maintenance and operation costs. Coverage of these otherwise excluded businesses would increase costs that are absorbed solely by the small building owner and would, therefore, accelerate abandonments.

In New York City, the ever-increasing cost of maintenance and operation of apartment buildings has resulted in the abandonment of tens of thousands of housing units each year. Rand Institute Report, *Rental Housing in New York City* at 6 (1970); Kristof, *Economic Facets of New York City's Housing Problems* at 19 (1970). At the same time, the city has an average apartment vacancy rate of

only 1.5% — of every 100 apartments, only one and one-half is available to be let at any given moment. New York Times, February 26, 1973, at 1, col. 1. Therefore, any increase in the abandonment rate would further impair an already severely limited market of available apartments, with its greatest effect falling on inner city residents who can least afford it.

Clearly, Congress did not intend that small independent businesses like the apartment buildings in issue here suffer the adverse economic impact of the Act's application, especially in light of the additional severe socio-economic problems such coverage would cause.

CONCLUSION

For the aforestated reasons, the decision of the Fourth Circuit should be reversed and the complaint in all respects dismissed.

Respectfully submitted,

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Dated: New York, New York
May 11, 1973

Supreme Court of the United States

October Term, 1972

NO. 72-844

E. E. FALK, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK, ET ALS.,

Petitioners,

v.

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF CITATIONS

Statutes

Miscellaneous

Supreme Court of the United States

October Term, 1972

No. 72-844

E. E. FALK, INDIVIDUALLY AND AS PARTNER IN DRUCKER AND FALK,
A. L. DRUCKER, INDIVIDUALLY AND AS PARTNER IN DRUCKER AND FALK,
E. B. DRUCKER, INDIVIDUALLY AND AS PARTNER IN DRUCKER AND FALK,
DAVID C. FALK, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK, AND
R. E. SMITH, INDIVIDUALLY AND AS PARTNER IN DRUCKER AND FALK,

Petitioners,

v.

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Respondent.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

Supreme Court. Certiorari was denied in *Falk* v. *Hodgson,* 404 U.S. 827 (1971) (App. C., Petition for Certiorari, p. 11). Certiorari was granted in *Falk* v. *Brennan,* ..... U.S. ....., 35 L. Ed. 2d 686 (1973) (App. 65).

Fourth Circuit. The first opinion of the United States Court of Appeals for the Fourth District is reported at 439 F.2d 340 (1971) (App. D., Petition for Certiorari, pp. 12-28), and the most recent opinion is reported 69 LC ¶ 32,759 (1972) (App. A., Petition for Certiorari, pp. 1-2).

District Court. The initial opinion of the United States District Court for the Eastern District of Virginia is reported in 312 F. Supp. 608 (E.D. Va. 1970) (App. E., Petition for Certiorari, pp. 29-40), and the second opinion is reported at 69 LC Par ¶ 32,758 (1972) (App. B., Petition for Certiorari, pp. 3-10).

JURISDICTION

The judgment of the Court of Appeals was entered on September 11, 1972. A timely Petition for a Writ of Certiorari was filed on December 8, 1972, and the petition was granted on February 26, 1973. The jurisdiction of the Court rests upon 28 U.S.C. 1254 (1).

STATUES INVOLVED

The appropriate sections of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *e. seq.*, read in pertinent part as follows:

> Sec. 3 (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee. . . . (29 U.S.C. 203 (d))
>
> Sec. 3 (e) "Employee" includes any individual employed by an employer. . . . (29 U.S.C. 203 (a))
>
> Sec. 3 (g) "Employ" includes to suffer or permit to work. 29 U.S.C. 203 (g))
>
> Sec. 3 (k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition. (29 U.S.C. 203 (k))

Sec. 3 (r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor:. . . . (29 U.S.C. 203 (r))

Sec. 3 (s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling or otherwise working on goods that have been moved in or produce for commerce by any person, and which—

(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) . . . (29 U.S.C. 203 (s).)

Sec. 6 (b) Every employer shall pay to each of his employees (other than an employee to whom subsection (a) (5) applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this Act by the Fair Labor Standards Amendments of 1966, wages at the following rates:

(1) not less than $1 an hour during the first year from the effective date of such amendments,

(2) not less than $1.15 an hour during the second year from such date,

(3) not less than $1.30 an hour during the third year from such date,

(4) not less than $1.45 an hour during the fourth year from such date, and

(5) not less than $1.60 an hour thereafter. (29 U.S.C. 206 (b))

Sec. 7 (a) (2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. (29 U.S.C. 207 (a) (2))

QUESTIONS PRESENTED

I. Under the Fair Labor Standards Act to be covered by an enterprise must have an annual gross volume of sales made or business done of $500,000. Is this figure to be measured by the gross rentals collected by the agent or by that agent's gross commissions?

II. Are maintenance workers employed at the buildings managed by petitioners employees of the apartment owner or of the petitioners?

STATEMENT OF THE CASE

This action was instituted by the Secretary of Labor on January 30, 1969, under Section 17 of Fair Labor Standards Act of 1938, against the defendants who are partners in the real estate management firm, Drucker & Falk. The activity of Drucker & Falk which is the catalyst for this case is its real estate agency relationship to owners of various apartment complexes within the State of Virginia.

Drucker & Falk's agency relationship is defined by written contract.[1] Under this contract Drucker & Falk had two main obligations. The first was to lease and collect the rents for the apartment projects. As to this aspect the contracts varied in that they may call for Drucker & Falk to furnish the employees for this service and bear that cost[2] or they may call for Drucker & Falk to merely supervise the personnel supplied by the owners, the owners bearing the cost.[3] Where Drucker & Falk bore the cost of the clerical help, these employees were paid as Drucker & Falk employees and are, therefore, not involved in this suit. In the situation where the owners of the project paid the clerical help, the employees were not paid overtime.

The other main obligation of Drucker & Falk was to supervise the operation and maintenance of the property within the budget set by the owners, the entire cost to be borne by the owners.[4] Since the employees were deemed to be those of the owners, they were not paid overtime.

In its capacity as agent for the owner, Drucker & Falk, with minor variations from project to project, carry out the maintenance of the apartment projects through a fairly

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[1] App. 34, 40. Sample contracts are at App. 50-57 and 58-64.

[2] App. 40, 58-59.

[3] App. 40, 51.

[4] App. 53 and 60-61.

autonomous Project Manager.[6] It is this individual, carried on the payrolls as an employee of the project,[7] who has the capacity to make normal day-to-day decisions and to do the day-to-day physical operation, maintenance, repair and upkeep of the project.[8] He is expected to make appropriate decisions as to the necessity for painting, redecorating and the extent of repair or replacement of damaged equipment.[9]

The average pay of the Project Manager is $125 per week with apartment and utilities furnished in addition to the weekly salary.[9] He is in charge of each project and hires, fires and supervises the maintenance employees of the project.[10] The Project Manager keeps the records of hours worked each week by the maintenance employees and submits the records directly to defendants central office where the payroll for the project is made up for the account of each owner.[11]

The project Manager submits a semi-annual budget request to the Area Manager and higher supervisory officials in Drucker & Falk's organization.[12] Defendants' officials review and revise the budget and present it, with their recommendation, to the project owner for approval.[13] The mainte-

[6] App. 45.

[7] App. 44. This is also true of the maintenance employees he supervises.

[8] App. 44.

[9] App. 44.

[10] App. 44.

[11] App. 44. Each employee of the project is paid on Drucker & Falk's checks from a special payroll account, (App. 44), which is an in and out account funded by the owner's rentals which have been collected. (App. 34, 44) Goods & services ordered by the project manager are paid by Drucker & Falk in a similar manner. (App. 45).

[12] App. 45.

[13] App. 45.

nance superintendent does not normally discuss the formal budget with the owner.[14] However, the owner normally inspects the property on at least a semi-annual basis and discusses the project needs with the maintenance superintendent.[15] This inspection is normally conducted just prior to the presentation of the budget request for the following period.[16] The budget as it is approved by the owner is sent to the maintenance superintendent by the Area Manager or other Drucker & Falk officials.[17] Generally, the budget places specific allowances for maintenance costs such as payroll, painting, grounds maintenance, plumbing, equipment repair, appliance replacement, etc.[18] Within the limits of the budget the Project Manager sets the hours of work and wage rates of the maintenance employees.[19] The Area Managers and higher supervisory officials in defendants' organization have, but rarely exercise, a veto over the decision of the Project Managers with respect to hiring, firing and setting wage rates.[20]

The Project Managers are in a position to know, but may not know, who the owners of the project are.[21] Most of the Project Managers know who the owners are and know that their wages are ultimately paid by the owner out of the rents for the project.[22] While they may talk to the owners oc-

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[14] App. 45.
[15] App. 45.
[16] App. 45.
[17] App. 45.
[18] App. 45.
[19] App. 45.
[20] App. 45.
[21] App. 46.
[22] App. 46.

casionally about the projects, the Project Managers look to Drucker & Falk for supervision and direction.[23]

Occasionally, but only rarely, Drucker & Falk has transferred maintenance personnel from one project to another; in each case this was done with the knowledge and approval of the owners.[24] Except in certain cases of a small project,[25] all employees work solely at the project where they are employed.[26]

The collection of rentals, the operation of the rental office, the dealing with tenant complaints and the maintenance of office records is normally done by Drucker & Falk employees.[27] As to these people, there is no dispute since they are carried on Drucker & Falk's payroll and were paid in accordance with the FLSA. At approximately seven projects the agency contracts call for Drucker & Falk to supervise this personnel as agents for the owners.[28]

As compensation for its services, the owners pay to Drucker & Falk a fixed percentage of the rentals collected.[29] With one exception, in no apartment project managed by

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[23] App. 46. This supervision and direction is supplied to the Project Manager through the Executive Director of the Management Department of Drucker & Falk, his assistant and/or the Area Manager. Drucker & Falk employs six area managers who are responsible for supervising a number of projects within a given area. (App. 43) All these individuals are on Drucker & Falk's payroll and not involved in this suit. (App. 43).

[24] App. 46.

[25] For those projects with no central facility there is a shared labor understanding where one maintenance man may work on two projects. He he is paid by two checks, one from each project. (App. 47).

[26] App. 48.

[27] App. 50.

[28] App. 50.

[29] Normally 4% when the rental office personnel are supplied by the owner. (App. 51, 55) and 6% when those people are supplied by Drucker & Falk. (App. 59, 62).

Drucker & Falk are the rentals greater than the statutory minimum, though if lumped togther they are substantially in excess.[20] Nor will the statutory minimum be met either by calculation of the individual commissions paid by each project to Drucker & Falk or by combining all those commissions together.[21]

It was this failure of the owners to pay overtime in the above situations which led to the institution of this suit against Drucker & Falk. Suit was not filed against the separate owners because it is admitted that the Fair Labor Standards Act did not reach to any one individual project owner. The only way the employees of the various projects managed by Drucker & Falk could come under the Fair Labor Standards Act is by virtue of the government's theory, i.e., Drucker & Falk is the employer of the project employees and that Drucker & Falk is an enterprise engaged in commerce. The District Court held that the employees were not those of Drucker & Falk and further, that the proper measure for enterprise coverage was gross commissions. The Fourth Circuit thought otherwise and reversed.

SUMMARY OF ARGUMENT

The Court in this case is faced with the proper interpretation of the FLSA in the context of an agency relationship. Specifically, the Court must decide whether the "gross volume of sales made or business done" is what is sold by the agent (his services) or whether it is the total receipts it collects from the rentals of another's apartment.

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[20] App. 48-50. The exception is Robin Hood Apartments at which all employees were paid according to the FLSA.

[21] App. 50, (calculated by taking 6% of the rentals collected by Drucker & Falk employees and 4% of the rentals collected by the owners' employees.

Petitioner's position is that Section 3(s) and the Congressional history require one look to the sales of Petitioners. These sales are represented by the gross commissions they receive for the sale of their services to the apartment owner. To link the agent's sales to the total funds he handles for the true owner through an in and out special bank account would fly in the face of the congressional intent to measure the agent's impact on commerce.

The other issue which the Court must resolve is whether under Sections 6 and 7 of the FLSA the managing agent of an apartment complex employs the maintenance workers. It is the Petitioners' position that the maintenance workers are employees of the owner, not the agent.

The mere fact that Drucker & Falk may meet the statutory definition of employer within the meaning of Section 3(d) of the Act is not dispositive of the issue. The question is whether Sections 6 & 7 also require that (1) the employees be those of the employer and (2) whether those sections also require that the employer employ those employees. Petitioner urges that the statute and the decided case law demand those questions be answered.

Drucker & Falk's position is that whatever it does for the apartment owner, it does as an agent. The maintenance workers are not the employees of Drucker & Falk, but rather those of the owner. The established test in the determination of whose employees are the maintenance workers, is who "as a matter of economic realty are dependent upon the business to which they render service." *Bartels* v. *Birmingham, infra.* In the factual context of this case, it is clear that the maintenance employees are an integral and necessary part of the owner's business of maintaining its property. Drucker & Falk's business is one of lending its expertise in the supervision of that labor.

Accordingly, the Court must conclude that the fair measure of sales made or business done of Drucker & Falk are the gross commissions it receives for the services it sells. Likewise, the Court must conclude that the maintenance workers are those of the owner and employed by him.

ARGUMENT

I.

Petitioners Are Not An Enterprise Since The Specified Gross Annual Volume Of Sales Made Or Business Done Is Measured By Gross Commissions, Not Gross Rentals

The FLSA, as amended in 1966, provided the following definition of an enterprise in Section 3(s):

> Enterprise engaged in commerce on the production of goods for commerce means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which (1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000.00 (exclusive of excise taxes at the retail level which are separately stated . . .)

Sale is defined in the Act to include "any sale, exchange, contract to sell, consignment for sale, or other disposition. (Section 3(k))

The government takes the position that gross rentals rather than gross commissions are to be the measure of the "gross volume of sales made or business done" under the 1966 amendments with, for purposes of this case, its $500,000 minimum requirement. Your Petitioners position is that the statutory language and the congressional intent is designed

to measure Drucker & Falk's gross business and this can only be measured by their gross commissions.

Three dollar-size provisions were placed into the act as an "economic test." The Senate Report No. 145, 89th Cong., 2nd Sess., elaborated on the point as follows:

> "(The million dollar test) . . . is the line which the Congress must draw in determining who shall and who shall not be covered by a minimum wage. It is a way of saying that anyone who is operating a business of that size in commerce can afford to pay his employees the minimum wage under this law." 1961 *U.S. Code Cong. & Ad. News,* p. 1624.

So it is clear the intention of the "dollar-test" was to measure the size of the business of the "enterprise" in question. How should that size be measured? Obviously by the actual funds received by the "enterprise" for its own purposes, not by the mere fact that, as agent, the petitioners act as a conduit for receipts it does not own.

Drucker & Falk's position is confirmed by the statutory language.

> . . . An enterprise *whose* annual gross volume of sales made or business done is not less than $500,000. . . . (Section 203(r), emphasis added.)

Thus, Congress required that one look to the enterprise's gross volume of sales. It is difficult to see how gross rentals are Drucker & Falk's gross volume of sales. The cases which have discussed the subject of "gross receipts" versus "gross commissions" show a split of authority on the issue. In *Schmidt* v. *Randall,* 160 F. Supp. 228 (D. Minn. 1958) the Court held that the inclusion of "gross receipts" rather than "commissions" only, in a case where defendant hotel handled the sale of tickets as an agent for Greyhound Lines, "would present an unrealistic picture of the defendant's business."

160 F. Supp. at 230. The Court held that only the commissions should be included. The *Schmidt* case relied in part on an identical holding in *Mitchell* v. *Carratt*, 160 F. Supp. 261 (S.D. Fla. 1956).

In the Fourth Circuit the government relied on *Wirtz* v. *Jernigan*, 405 F.2d 155 (5th Cir. 1968). But even accepting the *Jernigan* rationale and rejecting *Schmidt* and *Carratt* (which defendants urge would be "unrealistic" to do) means nothing as applied to the facts of the instant case. For *Jernigan* involved a situation where the owner of the "establishment" in question was involved. It was the owner's "gross sales" arising from his own establishment that was at issue.[32] The situation in the instant case of the gross business of an agent, working for the owner of the establishment, does not appear in any of the cases cited by the government, other than *Arnheim & Neely* v. *Hodgson*, 444 F.2d 609 (3rd Cir. 1971) and *Shultz* v. *Isaac T. Cook & Co.*, 314 F. Supp. 461 (E.D. Mo. 1970). The *Cook* and *Arnheim & Neely* cases are not persuasive because the courts relied (as did the Fourth Circuit in the instant case) on certain bank and insurance company cases where the defendant was the owner of the building in question.[33] The bank and insurance company decisions involved the question of whether the gross rentals of the building which the bank or insurance company owned should be included in the firm's gross volume of sales

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[32] It is interesting to note that the *Jernigan* Court implied that had it found that the defendant had a "mere custodial function," the ruling would have been different. (405 F.2d at 159) The District Court in this case found that Drucker & Falk had a "mere custodial function" when it said, "The sums to be distributed from said collections are controlled by the owner." (312 F.Supp. 608, 612-13 (1970))

[33] *Wirtz* v. *Savannah Bank & Trust Company*, 362 F.2d 857 (5th Cir. 1966); *Wirtz* v. *First National Bank and Trust Company*, 365 F.2d 641, (10th Cir. 1966) *Wirtz* v. *Columbian Mutual Life Insurance Company*, 380 F.2d 903 (6th Cir. 1967).

or business done. The courts in each of those cases held that the rental income was part of the bank's or insurance company's enterprise and thus, quite properly included those sums in computing the gross volume of business done. But, it is quite different to say the same where one is attempting to determine the gross business of an agent of the building owner when the agent is a mere conduit for the gross rentals. This distinction is basic to the determination in this case.

Irrespective of whether or not Drucker & Falk is an "employer" of these "employees," within the meaning of the Act, there can be no doubt that the rentals received by Drucker & Falk do not belong to anyone other than the owners of the buildings in question. By the same token, the insurance premiums received by Drucker & Falk in its insurance department do not belong to anyone other than the insurance company. Commissions received on these insurance premiums will be reflected, along with all other commissions, including rental commissions, in the annual statement of the company. It would be unthinkable that the gross business of someone else be included in the amount of business transacted. The gross rentals collected are no more a measure of Drucker & Falk's business size, than is the volume of loans, which may be handled by a law firm, or the total deposits of a bank, or the total receipts of a brokerage firm. As the District Court so aptly said below:

> Since the volume of business is one of the tests of whether a business is within the Act, it is difficult to believe Congress intended the measure of the size of the business to be the sum which passed through the business. That is, the total deposits of a bank, as opposed to its gross income; the total receipts of a brokerage firm from sale of properties of others on commission as opposed to the gross sum from sale of its services, its commissions; the total amount of a loan closed as opposed to the lawyer's gross fee; the sales price of real

> estate sold by a real estate agent or broker as opposed to his commissions. A real estate firm might act as agent for the sale of one parcel of land at a sales price of one million dollars in a year, with few other sales. Under the government's view, such a business, if the other requirements of the Act were met, would come within the Act.
>
> The "gross volume of sales made or business done" is what is sold by the Agent, his services. He cannot sell for himself what is not his. What he sells of the owners he sells for the owners as the owners' agent. This then is the owners' sale. The owner corporation can only act through agents. 312 F. Supp. 608, 612-13 (1970)

The conclusion, therefore, must be that the gross rentals collected by the defendants on behalf of the respective owners of the buildings which it manages cannot be a proper measure of the "sales made" or the "business done" of Drucker & Falk. A contrary holding would present an unrealistic picture of the defendant's business and deviate from the congressional intention to cover businesses in an economically realistic manner.

II.

The Maintenance Workers Employed At The Various Apartment Projects Managed By The Petitioners Are Employees Of The Owner, Not Of Drucker & Falk

A. The Result Of The Conclusion Which The Government Urges Would Be To Overrule Maryland v. Wirtz, *Disregard The Congressional Intent Of Not Extending The FLSA To Small Local Businesses, Sanction Fleeting Coverage And Turn On Its Head The Axiom That An Agent Can Rise No Higher Than Its Principal.*

In working through the definitions in the FLSA one, at first blush, concludes the Government is correct. The Secre-

tary argues that Sections 6 and 7 require every employer to pay the appropriate standards to each of his employees in an enterprise engaged in commerce. Since Section 3(d) defines employer very broadly, i.e., "any person acting directly or indirectly in the interest of an employer in relation to an employee," Drucker & Falk is at least acting indirectly in the interest of an employer (the owner). The argument continues that once it is found that Drucker & Falk is an employer, the rest flows naturally, for then they must pay their employees (i.e. those "employed by an employer") who are employed in an enterprise.

Yet the results of that reasoning fly in the face of a Supreme Court decision, clear congressional intent and an established legal axiom. As this Court pointed out in *Maryland* v. *Wirtz*, 392 U.S. 183,188, (1968), with regard to the 1961 and 1966 Amendments establishing the enterprise concept:

> The effect of the . . . (enterprise amendments) was to extend protection to the fellow employees of any employee who would have been protected by the original Act, but not enlarge the class of *employers* subject to the Act. (Italics in original.)

It is clear that the adoption of the "enterprise" amendments in 1961 did not enlarge the class of employers covered by the Act. Thus, if the defendants were not covered by the Act before 1961, they were not covered after 1961. The Secretary admits (App. 48) that before the 1966 enterprise amendments there were grave doubts as to the applicability of the Act to apartment house management companies. However, the Secretary implies that bolstered by the 1966 amendments it asserted its position that the Act covered activities like those of Drucker & Falk. (App. 48) Respectfully, your Petitioners submit, based on *Maryland* v. *Wirtz*,

supra, that the Department of Labor misconstrued the effect of the 1966 amendments as enlarging the class of employers, when, in fact, it was designed to enlarge the class of employees.

The statement cited above in *Maryland* v. *Wirtz* merely said what is perfectly clear from the legislative history. The purpose of the enterprise amendments could not be clearer.

> In general, the definition of such an enterprise (in section 3(s) of the Act) is based on annual dollar volumes of business and types of businesses. Under this category of coverage all the employees of such an enterprise will be covered by the Act, regardless of the relationship of their individual duties to commerce or the production of goods for commerce. Where a business does not fit into the definition of such an enterprise, certain individual employees of such business may, nonetheless, be covered if they qualify under the test of coverage established in 1938. (House Report No. 871, 89th Cong., 1st Sess., pp. 7-8; House Report No. 1366, 89th Cong., 2nd Sess., p. 9.)

In a similar vein, the Senate noted in its report on the 1961 Amendments:

> The bill also contains provisions which should insure that a small local independent business not in itself large enough to come within the new coverage, will not become subject to the act by being considered a part of a large enterprise with which it has business dealings. (Senate Report No. 145, 89th Cong., 2nd Sess.; *1961 U. S. Code Cong. & Admin. News* 1620, 1660.)

Not only does the Government's theory seek to expand the coverage of the FLSA where it was not intended, it also makes that coverage illusory. For example, coverage will depend solely on the existence of Drucker & Falk as the managing agent. Should the owner not like the finding of

the Court in this case and decides to discharge Drucker & Falk and undertake to do his own managing, there will be no coverage. Nothing has changed as far as the employee is concerned: he does the same work at the same place. It is almost specious to talk about Drucker & Falk's "impact on commerce" when the reality is that it is the *owner's* determination to hire or fire Drucker & Falk which makes the impact on commerce.

The element which the government consistently ignores is that Drucker & Falk is an agent. Of that there can be no question. Under our law it is axiomatic that an agent can rise no higher than his principal. However, if the Government's logic is accepted, he does. Congress never intended that the activities of an agent should shape the status of the employer.

If these results follow from the Government's argument, and they do, where is the misinterpretation of the law? We believe it lies in the Government's premise that once it is determined Drucker & Falk is an employer within the meaning of Section 3(d), they are obligated to pay under Sections 6 and 7. The assumptions that (1) Drucker & Falk acts as an "employer *in relation to an* employee" within the meaning of Section 3(d); (2) the maintenance employees are Drucker & Falk's as required by Section 6 and 7; and (3) the maintenance employees are employed by Drucker & Falk in an enterprise as required by Sections 6 and 7 are not supported by the facts, the law, or logic.

B. Petitioners, As An Agent, Do Not Act As An Employer In Relation To An Employee *Within The Meaning Of Section 3(d).*

Employer as defined in Section 3(d) "includes any person acting directly or indirectly in the interest of an employer *in relation to an employee.*" (Emphasis supplied) Drucker

& Falk contends that the owner of the project is the employer within the meaning of the FLSA. Your petitioners admit that they act "indirectly in the interest of an employer" (owner). That, they are required to do under their agency contract.

However, Drucker & Falk deny that they act as an employer "in relation to an employee." This is so because an employee is an "individual employed by an employer." (Section 3(e)) Drucker & Falk does not employ the maintenance men at the various projects. They merely supervise that activity on behalf of the project owner.

The well-reasoned case of *McComb* v. *McKay,* 164 F.2d 40 (8th Cir. 1947) is one of the many cases which support this distinction. The issue there was whether supervisors (McKays) were independent contractors for a railroad in their efforts to make, repair and store temporary grain and coal doors at a site maintained by the railroad. The Eighth Circuit observed:

> If the McKays represent the railroad in employing men and supervising the operations of the grain door yard, as the District Court determined, the men are not in any proper sense employees of the McKays, but are employees of the railroad . . . (*Id.* at 49)

The facts of the instant case support this reasoning. Drucker & Falk are agents of the owners—like the McKays, they represent the owners "in employing men and supervising the operations." The Court will recall that the management of each project is carried out by a project manager or superintendant, who is fairly autonomous. At best, this is the only individual to which Drucker & Falk acts as an employer *in relation to an employee,* and that individual is not an employee of Drucker & Falk.

C. The Maintenance Employees Are Employees Of And Employed By The Project Owners And Are Not Employed By Drucker & Falk In Its Enterprise Within The Meaning Of Sections 6(b) And 7(a) (2)

The definition of employer in the FLSA is a legal fiction, especially as it applies to an agent as in the case at bar. Under the common law standards an employer could not be a person acting indirectly for an employer. Otherwise, the track foreman at the C & O Railroad, directly supervising hundreds of men, would have liability under the FLSA. More pointedly, perhaps, is the possibility under the Act that each justice of this Court would be responsible for the wages of his clerk. Yet, the government would urge that the FLSA adopts such a standard.[34]

However, Congress in determining in Sections 6 and 7 who shall pay certain standards and to whom adopted language which avoided this result. Sections 6 and 7 require NOT that every employer shall pay to each employee a certain standard,[35] but rather that "every employer shall pay to each of *his* employees" a certain standard.

Thus, in a nutshell we are saying this: You must look to Sections 6 and 7 to see who is obligated to pay the standard. Those sections say that an employer is obligated to pay those standards. An employer may be one who acts indirectly. The next question one asks is who is the employer obligated to pay. The Act says *his* employees. His employees cannot properly be interpreted to mean those employees to whom he acts only as agent for the true employer.

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[34] As this Court pointed out in *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, 150 (1947): This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.

[35] This language would be consistent with the legal fiction of the employer definition in 3(d) and the employee definition in 3(e).

The same argument with regard to the importance of the word "his" can be made with regard to meaning of the word "employ" in Sections 6 and 7. Those sections require every employer to pay to each "of his employees . . . who is employed in an enterprise engaged in commerce." The maintenance employees are not *employed* in or by Drucker & Falk's enterprise.[36] While employ is defined in 3(g) as "to suffer or permit to work" this cannot mean that an employee hired by a principal's agent, the product of his labor primarily being used for the benefit of the principal, is employed or is "suffered or permitted to work" by the agent. *Cf. Maddox* v. *Jones,* 42 F. Supp. 35, (N.D. Ala. 1941).

Put yet another way, all your petitioners are saying is that it is one thing to determine whether a party comes within the Acts broad definition of "employer"; it is quite another to determine whose business employs the employee. *McComb* v. *McKay,* op. cit.; *Hodgson* v. *Royal Crown Bottling Co., Inc.,* 324 F. Supp. 342, 356, 357, (N.D. Miss. 1970); *Shultz* v. *Isaac T. Cook Co.,* 314 F. Supp. 461, F.2d 609 (3rd Cir. 1971); *Cf. Walling* v. *Portland Terminal Co.,* op. cit.; *United States* v. *Rosenwasser,* 323 U.S. 360 (1945); *Williams* v. *Jacksonville Terminal Co.,* 315 U.S. 386 (1940); *United States* v. *Silk,* 331 U.S. 704 (1947); *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722 (1947).

D. As A Matter Of Economic Reality, The Maintenance Workers Are Employees of The Project Owner, Not Drucker & Falk.

Thus, the inquiry does not end merely because an individual may meet the statutory definition of an employer. One must still determine whether the maintenance employees are those of Drucker & Falk or those of the owner.

[36] Assuming the existence of an enterprise.

In making this determination, this Court in *Bartels* v. *Birmingham*, 332 U.S. 126, 130 (1947) characterized the appropriate inquiry as follows:

> "... [I]n the application of social legislation employees are those who as a matter of *economic reality* are dependent upon the business to which they render service."

And in viewing these facts can there be any doubt as to whose business the employees are dependent as a matter of economic reality.

In the case at bar, it is quickly seen that the employees are an integral and necessary part of the owner's business, maintaining its property. The defendants do not run a janitorial "Kelly Girl" service. They are in the business of selling their expertise and supervision to apartment projects for a commission of the rentals. (App. 40) The owners request Drucker & Falk to undertake the supervision of the maintenance of the property (App. 40), for the maintenance of the physical property is an integral and fundamental part of the owner's asset. Managing agents may come and go, but the employees stay. (App. 56)

Another economic reality points to the owner as the employer as opposed to Drucker & Falk. The most basic economic fact—who pays the employee—Stipulation 3(d) clearly states that this is the owners of each apartment building. (App. 44) In point of fact, the defendants have absolutely no obligation to pay the employee. If the apartment project does not generate the income to meet the overhead, payment of salaries are the owners' obligation. (App. 52, 59)[37]

[37] The Government may seek to gain mileage out of the fact that the employees are paid by Drucker & Falk check (App. 43), but on whose check or over whose signature payment is made has no economic reality.

The third most fundamental economic fact, who sets the amount of the wage, again demonstrates the defendants are not the employers. The owners, not the defendants, set the wage. Each year the owners approve a budget which places specific allowances for maintenance costs such as payroll (App. 45) and the wage scale is effectively bound by the limits of the budget. It should be underscored that as a practical matter, Drucker & Falk has little or nothing to do with the setting of wages even within the budget. (App. 45) This is the job of the superintendent, who works on the premises and reviews the budget with the owners. (App. 45)

Another economic fact is the employee's allegiance, i.e., for whom does the employee feel he's working. Again the facts demonstrate the employer is the owner of the project. Stipulation 4(d) tells us (1) that the employees of the various apartment complexes stay with the owners, not the managing agents, and (2) that even if offered a job with Drucker & Falk the employee feels his allegiance to the owner, not to the defendants. (App. 46)

What is obvious then, is that all the parties to the arrangement, the owner, Drucker & Falk and the employees considered the project employees in the employment of the owners, not Drucker & Falk. In close cases the view taken by the parties of their relationship is particularly relevant. *Illinois Tri-Seal Products, Inc.* v. *United States,* 353 F.2d 216, 218 (Ct. Cl. 1965).

The contract between the owner and Drucker & Falk specifically provided that "employees required for the operation and maintenance of the premises . . . (are) . . . deemed employees of the owners." (App. 53, 60) While the label the parties place upon the relationship is not controlling, this agreement, along with the control by the owners as to sala-

ries (App. 45), as to location of employment (App. 48) and as to loyalty of the employees (App. 46), is indicative of the view of the parties. This is particularly true when it is understood that clerical personnel, who by contract are Drucker & Falk employees, were paid the minimum wage, and thus, not covered by this lawsuit. (App. 42)

The last economic reality of an employer, i.e., the common law tests of the right to hire, fire and direct the activities of the employees, is perhaps met by Drucker & Falk. Yet, the exercise of these rights are directed primarily only to one individual, the Project Manager, and then only as agent for the owner.

This failure of the government to face the economic reality of the relationship leads it astray in its analysis. The cases which it relied on below such as *Greenberg* v. *Arsenal Bldg. Corp.* 50 F. Supp. 700 (S.D.N.Y. 1943), aff'd 144 F.2d 292 (2nd Cir. 1944), rev'd in part on other grounds *sub nom Brooklyn Bank* v. *O'Neill,* 324 U.S. 697 (1945), *Asselta* v. *149 Madison Avenue Corp.*. 65 F. Supp. 385 385 (S.D.N.Y. 1945), aff'd 156 F.2d 139 (2nd Cir. 1946), *McComb* v. *Homeworkers' Handicraft Corp.,* 176 F.2d 633 (4th Cir. 1949) and *Southern Ry. Co.* v. *Black,* 127 F.2d 280 (4th Cir. 1942), etc., etc., were clearly correct. In each of these cases, while not identifying the five economic realities outlined above, the courts found at least four of these elements. In the instant case, only the common law test can be found. In the Senate Report No. 1487, 2 *U.S. Cong. and Admin. News* (1966), page 3029, the Senate Committee underscored this interpretation by saying that the "total situation controls." When the total situation is reviewed, it is clear that whatever functions Drucker & Falk carry out are done so as agents for the owner of the project.

Further, it is clear that the services which the employees perform are an integral part of the owner's business, not

Drucker & Falk's. Accordingly, one ought to conclude that the maintenance men at the apartment project are employed by the owner and in the owner's enterprise within the meaning of Sections 6 and 7 of the FLSA.

CONCLUSION

The judgment of the court of appeals should be reversed and the judgment of the district court reinstated.

Respectfully submitted,

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No. 72-844

In the Supreme Court of the United States

OCTOBER TERM, 1973

E. E. FALK, ET AL., PETITIONERS

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

508-912—73——1

CITATIONS

Cases—Continued

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PETER J. BRENNAN, SECRETARY OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The first opinion of the court of appeals (Pet. App. D) is reported at 439 F. 2d 340, certiorari denied, 404 U.S. 827. Its second opinion (Pet. App. A) is unreported. The first opinion of the district court (Pet. App. E) is reported at 312 F. Supp. 608. Its supplemental opinion on remand (Pet. App. B) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1972. A petition for a writ of certiorari was filed on December 8, 1972, and was granted

on February 26, 1973. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, for purposes of the "enterprise" coverage provisions of the Fair Labor Standards Act, the "annual gross volume of sales made or business done" by petitioners as part of their general real estate brokerage and management activities should be determined by the gross rentals which they collect from the tenants who occupy the buildings which they manage and operate for the building owners, or by the commissions which petitioners deduct from the gross rentals.

2. Whether the building maintenance workers whom petitioners hire, fire, and supervise are employed in petitioners' building management enterprise.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*, are set forth in petitioners' brief at pp. 2–4.

STATEMENT

This suit was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act, 29 U.S.C. 217, to restrain petitioners from violating the Act's minimum wage (Section 6(b)), overtime (Section 7(a)(2)) and recordkeeping (Section 11 (c)) provisions, and from continuing to withhold unpaid wages due certain building maintenance employees. Petitioners stipulated the amounts that would

be due under the Act's minimum wage and overtime provisions (App. 37), but denied that they were "employers" of the maintenance workers or that they were an "enterprise" subject to the Act's requirements. The district court sustained these contentions and dismissed the complaint, but the court of appeals reversed, and, on remand, the district court entered judgment enjoining further violations of the Act and directing petitioners to pay the stipulated amounts together with interest at six percent. This supplemental judgment was upheld by the court of appeals.

1. Petitioners, partners in the firm of Drucker & Falk, are engaged in various real estate brokerage and management activities, including the operation and management of some 30 apartment buildings located in various cities in Virginia (App. 13–16, 26, 40). These management activities are carried out pursuant to contracts with the building owners. Under these contracts, petitioners "stand in the shoes of the owner" (App. 41) and perform all of the functions required for leasing, maintaining, and operating the apartment buildings. They advertise the availability of apartments for rent;[1] sign, renew, and cancel leases; collect rents; institute, prosecute and settle all legal proceed-

[1] A "typical" advertisement consists of a map showing the location of several projects and containing the caption "THAT'S US ALL OVER" and the name "DRUCKER & FALK" in large capital letters (App. 34, 38–39). Prospective tenants are directed either to the partnership's main offices in Newport News or to "Drucker & Falk" at the apartment location (App. 39).

ings for eviction, possession of the premises, and unpaid rent; make repairs and alterations; negotiate contracts for electricity, gas, fuel, water, telephone service, window cleaning, rubbish removal, repair work, and other services; purchase supplies; pay all bills, including mortgage payments, taxes, insurance, etc.; prepare an operating budget for the owner's review and approval; submit periodic reports to the owner; and hire, discharge, and supervise all labor and employees required for the operation and maintenance of the premises (App. 40–42, 51–53, 58–61). The participation of the building owners, some of whom reside outside the State, is limited to their review and approval of the budgets prepared by petitioners and periodic visits to their buildings (App. 18–19, 45).

Petitioners conduct these building management activities from their main office in Newport News, under the direction and control of their "management department." This department is staffed by an Executive Director, who has overall responsibility for the operation and management of the 30 apartment buildings, an Assistant Executive Director, and six area managers, each of whom is "responsible for supervising and enforcing management policies" at one or more of the buildings (App. 28, 43). These individuals are admittedly employees of the petitioners (App. 31). Other admitted employees include the rental agents and clerical personnel hired to operate the rental offices, collect and deposit rents, take tenant complaints, maintain office records, and transmit re-

ceipts and other information to petitioners' main office (App. 43).[2]

In addition to these employees, petitioners assign a maintenance superintendent or project manager to each building or building complex. These superintendents are hired by petitioners and work under the direct control of the six area managers in petitioners' main office (App. 34, 43–44). Subject to petitioners' approval, the superintendents hire, fire, and supervise the maintenance employees necessary for the operation of the building or buildings to which they are assigned (App. 44–45). More than 100 superintendents and maintenance workers are required to operate the 30 buildings managed by petitioners, and it is their wages which are the subject of this action (App. 28–31; Pre-trial Exh. 2). Although these workers are labelled by the contracts as "employees of the project owners" (App. 40, 42, 53, 60), they "may not know who the owners * * * are" (App. 46); they are hired by petitioners, either directly or indirectly, and they "look to [petitioners] for supervision and direction" (App. 34, 45–46). It is petitioners who establish their hours and wages, acting within the limits of the budgets they prepare for each owner (App. 41, 43–45). Petitioners also arrange for transfers and promotions (App. 46), including the occasional promo-

[2] Although there were some instances in which these employees were carried on the payroll of the building owner, they were nonetheless supervised and paid by petitioners (App. 40–43, 50). In any event, none of these employees received wage payments which would be substandard under the Act.

508-912—73——2

tion of a maintenance worker to a superintendent position or transfer of a maintenance worker or superintendent from one project to another having a different owner (App. 46; see also the employment history of C. E. Crayton in Pre-trial Exh. 2). Such transfers or promotions are initiated by petitioners "with the knowledge of the owners" (App. 46). Owner approval is obtained to use employees attached to particular projects at other projects which are too small to warrant a full-time staff (App. 47). When this occurs, the maintenance work at the smaller buildings is performed at cost. In other cases, the superintendents and maintenance employees work jointly at two different projects having different owners (App. 47).

Petitioners, under the name of Drucker & Falk as agent, pay all the expenses incurred in operating and maintaining the apartment projects, including the wages of the building service employees, from rent receipts deposited into local customer accounts (App. 41, 43–45, 52, 60). Rents from the several buildings managed by petitioners totalled $7,725,600.86 in 1967 and $8,607,086.04 in 1968 (App. 17). Payments are transmitted to the building owners on a periodic basis, after petitioners have deducted their commissions—which totalled $434,228.15 in 1967, and $462,757.50 in 1968—and paid the other expenses (App. 17–18). If disbursements are in excess of gross receipts, the owners are required to reimburse petitioners (App. 41).

2. When the case was first before it, the district court held that petitioners' building management activ-

ities were not covered by the Act on the ground among others, that they did not meet the dollar-volume test prescribed by Section 3(s)(1) in that the "annual gross volume of sales made or business done" must be measured by petitioners' commissions and not by the gross rentals received from the several buildings (Pet. App. E, pp. 29–40). The district court also agreed with petitioners that the building superintendents and other maintenance workers were "employees of the project and not employees of [petitioners]" (*id.* at 39).

The court of appeals reversed. It first rejected petitioners' contention that they were not the employers of the workers at the apartment projects. In concluding that the requisite employment relationship existed, the court noted the liberality with which the courts have traditionally viewed the issue of employment status for purposes of coverage under the Act and the character and extent of petitioners' control over the employment, discharge, and supervision of the workers (Pet. App. D, pp. 19–21). It next held that petitioners' activities at the various buildings constituted a single "enterprise" for coverage purposes (*id.* at 21–23). Third, it held that the proper measure of the size of petitioners' enterprise was the gross rentals collected rather than the commissions thereon; it reached this conclusion on the basis of the settled proposition that rental of property constitutes a "sale" within the meaning of the Act's enterprise coverage provisions (*id.* at 24), and its view that Congress intended coverage to turn upon the impact of an enter-

prise on commerce, which, in this case, is more fairly measured by "the gross volume of rents it collects, not just the amounts it is entitled to pocket" (*id.* at 25).

Petitioners sought review by this Court, but their petition was denied (404 U.S. 827), and, upon remand of the case to the district court, judgment was entered for the Secretary restraining violations and ordering restitution in the amounts which had been stipulated to be due the employees, together with interest (Pet. App. B, pp. 3–10). This judgment was affirmed by the court of appeals (Pet. App. A, pp. 1–2). Petitioners again sought review by this Court, and their petition was granted, but, in view of the Court's decision in *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512 (which approved the court of appeals' construction of the "enterprise" definition of Section 3(r) in the instant case), review was limited to the "gross sales" and "employment" issues (Questions 2 and 3 in the petition for certiorari).

SUMMARY OF ARGUMENT

1. The court of appeals was correct in determining that petitioners' enterprise met the dollar volume test for coverage under Section 3(s)(1) of the Act on the basis of gross rentals generated by petitioners' building management activities, rather than considering only commissions. The statutory test is not the magnitude of an enterprise's income or profits, but rather the "annual gross volume of sales made or business done." Leases of real property have long been recognized as "sales" for purposes of the Act, and it is undisputed that petitioners make leases with apartment tenants generating annual rentals of about $8,-

000,000. Petitioners would have the Court consider only the sales of their building management services made to the building owners, which are concededly to be measured by the commissions paid them for such services. However, coverage in this case is predicated not on the sales of management services but on the sales of building space made to tenants; these sales are made by petitioners and are rationally measurable only by the gross rentals received therefrom.

The holding of the court of appeals is consonant not only with the plain statutory language but also with the congressional purpose in adopting enterprise coverage and a dollar volume test in connection therewith. Congress utilized sales volume as the standard in order to reflect the impact of the activities of an enterprise on commerce, an impact that is unchanged in petitioners' case by the identity of the building owner. As the Senate Report accompanying the 1966 enterprise amendments to the Act explained, the dollar volume test "is intended to measure the size of an enterprise * * * in terms of the annual gross volume in dollars * * * of the business transactions which result from activities of the enterprise * * *." Application of this criterion to petitioners' leasing activities requires use of rents as the standard.

Measurement of petitioners' enterprise by the volume of rents generated is also consistent with the economic reality of the operations involved in the rental and management of the buildings. It is petitioners, not the building owners, who rent the space and supervise the maintenance of the buildings. Sim-

ilarly, petitioners, utilising the rental receipts they collect, purchase materials, supplies, and services necessary for all 30 apartment buildings they manage; petitioners' activities thus have the same effect on the flow of men, money, and materials across state lines as they would if petitioners themselves owned the buildings. The soundness of the approach to this issue taken by the court of appeals is confirmed by the fact that every other appellate court considering the same issue or a similar one has reached the same conclusion.

2. A similar line of reasoning supports the conclusion of the court of appeals that the building maintenance workers are employed in petitioners' enterprise and therefore entitled to the protections of the Act. The Act clearly defines an "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee * * *" (Section 3(d)), a description plainly applicable to petitioners in their relation to the building personnel. The definition of the term "employ" in Section 3(g) as including "to suffer or permit to work" confirms this conclusion, since it is petitioners, not the building owners, who have control over the hiring, job assignments, and discharge of the building workers.

It is fallacious to characterize the employment relationship between petitioners and the building workers as one that is purely derivative from the workers' status as employees of the building owners (under the plain statutory language, that characterization would not, in any event, enable petitioners to avoid independent responsibility as an employer under the Act). Petitioners have their own business—different

from and independent of that of the building owners—of managing real property for others. The employees are indispensable to the conduct of that business of petitioners. Given this fact and the pervasive control by petitioners of the terms and conditions of the work of these employees, it is petitioners who, as a matter of economic reality, are the primary employers of the building personnel.

Again, as with the rents/commissions issue, uniform appellate precedent supports the court below in its determination that petitioners are subject to the duties imposed, for the benefit of their employees, upon employers operating covered enterprises. There is no basis in the language, history, or purposes of the Fair Labor Standards Act, or its amendments, for depriving the janitorial and maintenance personnel utilized by petitioners in the conduct of their apartment building management business of the benefits of the statutory minimum wage and maximum hours provisions, to which those employees are entitled under the plain terms of the amended Act.

ARGUMENT

I. THE GROSS RENTALS GENERATED BY PETITIONERS' BUILDING MANAGEMENT ACTIVITIES, NOT THE COMMISSIONS PAID BY THE BUILDING OWNERS, CONSTITUTE THE PROPER MEASURE OF THE "ANNUAL GROSS VOLUME OF SALES MADE OR BUSINESS DONE" BY PETITIONERS' ENTERPRISE

Petitioners first contend that their business is too small to meet the dollar volume requirements of the Act for enterprise coverage. This contention is based

on the premise that the dollar volume test should be applied solely to the commissions petitioners earn and not to the gross rentals generated by their building management activities—in other words, that consideration should be given only to the sales of petitioners' services to the building owners, and that petitioners' sales of rental property to the building tenants should be ignored. The court of appeals rightly rejected this contention, which is contrary to the language of the statute, runs counter to the congressional purpose reflected in the legislative history, ignores economic reality, and conflicts with a uniform line of decisions by the courts of appeals.

A. THE LANGUAGE OF THE STATUTE REQUIRES MEASUREMENT OF THE SIZE OF PETITIONERS' BUSINESS BY GROSS RENTAL VOLUME RATHER THAN MERELY COMMISSIONS

Section 3(s)(1) of the Act, 29 U.S.C. 203(s)(1), defines a covered enterprise as one "whose annual gross volume of sales made or business done is not less than $500,000[*] (exclusive of excise taxes at the retail level which are separately stated) * * *." It has been settled at least since *Kirschbaum* v. *Walling*, 316 U.S. 517, 526, that the leasing of property constitutes a "sale" for purposes of the Act, "sale" being defined in Section 3(k) to include "any sale, exchange, consignment for sale, shipment for sale, *or other disposition*" (emphasis supplied). See, *e.g.*, *Wirtz* v. *Savannah Bank & Trust Co. of Savannah*, 362 F. 2d 857, 863

[*] The $500,000 standard was in effect during the period covered by this suit. The standard was reduced to $250,000 as of February 1, 1969.

(C.A. 5); *Wirtz* v. *First National Bank and Trust Co.*, 365 F. 2d 641 (C.A. 10).

It is undisputed that the leasing of the property in this case is done by petitioners and that the annual dollar volume of these leases "sold" by petitioners approximated $8,000,000 during the years in question (App. 17). The plain language of the Act thus requires the conclusion that petitioners' enterprise is covered insofar as the dollar volume test is concerned.

Petitioners seek to avoid the consequences of the statutory language by suggesting that sales should be recognized only when or to the extent that they generate "actual funds received by the 'enterprise' for its own purposes" (Br. 12). Such a construction would not only read into the statute provisions that are neither present nor reasonably inferrable from its language, but would actually require that the express statutory directive be ignored. It is true, of course, that petitioners' commissions represent the correct measure of the dollar volume of the sales made by them to the building owners of their real estate management services, but those are not the only sales petitioners make and are not the sales which here create coverage under the Act; rather, the Act's coverage follows from petitioners' sales (rentals) of apartments to tenants, the amount of which is rationally measurable only by rents, not commissions.

B. THE LEGISLATIVE HISTORY AND PURPOSES OF THE DOLLAR VOLUME TEST FOR ENTERPRISE COVERAGE SUPPORT THE COURT OF APPEALS' RELIANCE UPON RENTS RATHER THAN COMMISSIONS

Not only is petitioners' contention that their rental activities should be ignored in determining the size

508-012—73——3

of their operation contrary to the unambiguous statutory language, it is also contradicted by the legislative history of Section 3(s)(1) and incompatible with the purposes of the enterprise coverage amendments.

The Act's enterprise coverage amendments were adopted in 1961 (75 Stat. 65) to extend protection to employees who, although not themselves engaged in commerce or in the production of goods for commerce, are employed in an enterprise that is so engaged. H. Rep. No. 75, 87th Cong., 1st Sess., p. 7; S. Rep. No. 145, 87th Cong., 1st Sess., pp. 5–7, 40–41; see also *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 517. Such an enterprise was defined as one which, in addition to having some employees engaged in commerce-connected activities, had an "annual gross volume of sales of * * * not less than $1,000,000" (75 Stat. at 66). The purpose of the dollar volume test, as is clear from the legislative reports, was to differentiate for coverage purposes on the basis of the size of the enterprise's operations and their impact on commerce. Thus, both the House and Senate Reports stated that the new provisions would cover "large enterprises of various kinds * * * which, because of their size and importance to our national economy, should be brought within the coverage of the act," including "real estate" firms (H. Rep. No. 75, *supra*, pp. 3, 7, 13; S. Rep. No. 145, *supra*, pp. 6–7, 31; see also the Labor Subcommittee staff report offered on the floor by Senator McNamara, 107 Cong. Rec. 5842).

Petitioners' discussion of the dollar volume test ignores this part of the legislative history and focuses instead on the Senate Report's use of the word "afford," which they contend demonstrates an intent to measure the "size" of an enterprise by its gross income and not by the gross receipts (or "sales") which result from its activities.[4] Congress, however, used the term "sales," not "income," and it defined this term as including "*any* sale" (Section 3(k); emphasis added), which, on its face, embraces *all* sales, whether made by one as an agent or as a principal.[5] Any possible doubt of the congressional intent in this regard is dispelled by the Fair Labor Standards

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[4] The full paragraph of the Senate Report reads as follows: "Finally, the million dollar test in the committee bill is not the constitutional standard for coverage. The constitutional standard for coverage is contained in these requirements which have just been discussed. The million dollar test is an economic test. It is the line which the Congress must draw in determining who shall and who shall not be covered by a minimum wage. It is a way of saying that anyone who is operating a business of that size in commerce can afford to pay his employees the minimum wage under this law" (S. Rep. No. 145, *supra*, p. 5). When the sentences cited by petitioners are read in context, together with the subsequent statements at pages 6–7 of the Senate Report (quoted above), it is clear that Congress was concerned not with who *could*, but with who *should* pay the minimum—based on the size of the enterprise's activities and the impact of those activities on commerce.

[5] The breadth of the word "sale" is confirmed by the proviso to Section 3(s)(1), which excludes from annual gross sales any "excise taxes at the retail level which are separately stated." If, as petitioners contend, Congress had intended the dollar volume test to apply only to those receipts which are *owned* by the enterprise, express exclusion of excise taxes, which are collected by the enterprise on behalf of the government, would

Amendments of 1966 (80 Stat. 830, 831), which substituted the phrase "annual gross volume of sales made or business done" for the earlier phrase "annual gross volume of sales."[6] As explained in the accompanying Senate Report (emphasis added):[7]

> This test * * * is intended to *measure the size of an enterprise* for purposes of enterprise coverage *in terms* of the annual gross volume in dollars (exclusive of specified taxes) *of the business transactions which result from activities of the enterprise*, regardless of whether such transactions are "sales" in a technical sense.
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> * * * The annual gross volume of sales made or business done by an enterprise, within the meaning of section 3(s), will thus continue [under the 1966 Amendments] to include both

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have been unnecessary. Further evidence that Congress did not intend the result petitioners seek is found later in the Senate Report (S. Rep. No. 145, *supra*, p. 38):

"The method of calculating the requisite dollar volume of sales or business [for enterprise coverage purposes] will be the same as is now followed under the law with respect to calculating the annual dollar volume of sales in retail and service establishments, and in laundries under the exemptions provided in section 13(a)(2), (3), (4), and (13) of the act. The procedure for making the calculation is set forth in the Department's interpretative Bulletin [pertaining to retailers of goods and services]. As it is there stated, the 'annual dollar volume of sales' consists of the *gross receipts from all types of sales* during a 12-month period" (emphasis added).

[6] The 1966 Amendments, under which this suit was brought, also reduced the dollar volume requirement to $500,000 for the period from February 1, 1967, to January 31, 1969, and to $250,000 thereafter.

[7] S. Rep. No. 1487, 89th Cong., 2d Sess., pp. 7–8.

the gross dollar volume of the sales (as defined in sec. 3(k)) which it makes, *as measured by the price paid by the purchaser* for the property or services sold to him (exclusive of any excise taxes at the retail level which are separately stated), *and the gross dollar volume of any other business activity* in which the enterprise engages *which can be similarly measured on a dollar basis. This would include*, for example, *such activity* by an enterprise *as* making loans or renting or *leasing property of any kind.*

Clearly, therefore, petitioners' size—for purposes of enterprise coverage—is to be measured by the volume of gross rentals resulting from their activities in renting and managing the several apartment buildings.[4] As the Tenth Circuit stated in a similar case: "Management [Company] markets the property under its control by renting or leasing space to tenants. This is a 'disposition' within the statutory definition, and, we believe, conforms with the congressional intent to set a standard of size of those businesses which would be covered by the 1961 amendments" (*Wirtz* v. *First National Bank and Trust Company*, 365 F.2d 641, 645).

[4] Contrary to petitioners' assertion (Br. 13), the management company and the bank involved in the *First National* case were separate corporations, and the management company simply managed the buildings owned by the bank. Although the Tenth Circuit concluded that the two corporations constituted a single enterprise, it also held that the management company was itself a covered enterprise, since its annual gross volume of sales, measured by gross rentals and not by commissions, exceeded $1 million.

C. MEASUREMENT OF THE SIZE OF PETITIONERS' ENTERPRISE BY ITS RENTAL VOLUME COMPORTS WITH ECONOMIC REALITY

Petitioners' contention that consideration of rents rather than just commissions "deviate[s] from the congressional intention to cover businesses in an economically realistic manner" (Br. 15) does not withstand analysis in light of the congressional intent to predicate coverage on the extent of an enterprise's impact on commerce.

Petitioners, like the management company in *First National, supra,* are actively engaged in marketing space at the 30 apartment projects covered by their contractual arrangements with the building owners. It is they, not the building owners, who make the sales of this space.

Moreover, unlike a collection agency, which merely collects rents from tardy tenants, petitioners hire, fire and supervise more than one hundred maintenance, rental and clerical workers engaged in every aspect of apartment management and operation. These workers, under the direction of petitioners' management department, advertise vacant apartments, interview prospective tenants, negotiate leases, handle tenant complaints, represent the owner in all litigation, prepare budget proposals, maintain all accounts and necessary records, develop marketing and operating policies, negotiate contracts for services and major repairs, redecorate the apartments, and generally maintain and repair the property. It is petitioners, not the building owners, who, using the rent receipts which they collect, pay for all services and repairs and purchase all supplies needed for the operation and main-

tenance of the 30 apartment buildings, including, for example, fuel, paint, plumbing and heating supplies, carpentry materials, etc.—substantial quantities of which originate outside the State.

In these circumstances, the fact that the buildings are owned by others does not reduce the magnitude of petitioners' marketing activities, nor does it diminish the impact of those activities on commerce. As the Sixth Circuit stated in *Wirtz* v. *Allen Green & Associates, Inc.*, 379 F.2d 198, in rejecting the employer's claim that its construction activities did not meet the dollar volume test for enterprise coverage because the completed structures (which had an assessed value of more than $1 million) were never sold (*id.* at 199–200):

> The underlying concern of the Act is the impact of the particular activity upon interstate commerce. From this perspective the ultimate disposition of the construction has little relevance. The important consideration is whether the activity which went into the actual building process is likely to have an effect on the flow of men, money, and materials across state lines. In this case Congress has exercised the legislative judgment that any activity which creates a business volume of $350,000 or more [in the case of construction enterprises] is likely to have a substantial impact on the channels of the national economic system. The fact that the contractor does not sell the building after its completion does not mean that in constructing it for his own purposes he did not set in motion substantial interstate commercial activities or avail himself of the facilities of other interstate enterprises.

So here, petitioners' activities in selling space at the 30 apartment projects under their control have the same "effect on the flow of men, money, and materials across state lines" as they would if petitioners owned the buildings. Regardless of ownership, "the business transactions which result from [these] activities" are lease agreements (i.e., the sale of space), and their gross dollar volume—for purposes of determining the size of petitioners' enterprise—is to be measured by gross rent receipts, as the court below held.*

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*There is, moreover, no reason to assume that petitioners realize less net income from their activities in managing these buildings than they would if they owned the buildings. Although gross rentals "belong" to the building owners, these sums must be used to pay all the expenses of operation. That Congress could never have intended to condition coverage on "ownership" of the gross receipts generated from the activities of an enterprise is clear from its coverage of gasoline service establishments (Section 3(s)(1)). Gasoline is frequently sold under consignment arrangements whereby the station's gross receipts are the property of the consigning oil refiner. The station, however, will net approximately the same income as a station of comparable size which purchases the gasoline in advance and pays for these goods out of gross receipts.

In any event, the Act has never been concerned with profits. Thus, in *Northwestern-Hanna Fuel Co.* v. *McComb*, 166 F.2d 932 (C.A. 8), where the employer argued that its accommodation sales to other coal dealers should not be counted as "sales" for purposes of Section 13(a)(2) since they were made without profit, the court rejected the argument, stating (*id.* at 937): "* * * But [the dealer sales] were actual sales transactions; the fact that they were made without profit did not change their legal aspect; they involved work operations which appellant's employees were engaged to perform; * * * [and] the trial court therefore was not required to ignore these sales, as appellant contends."

Petitioners and the district court are incorrect in suggesting that measurement of the size of petitioners' enterprise by their sales of rental space is tantamount to including, as a general proposition, all sums "which pass through [a] business" (Br. 14). The comparison to deposits received by a bank or collections made on behalf of clients by a law firm (neither of which would be considered by the Secretary in measuring the size of those enterprises) is unsound. The deposits of sums of money with a bank for safekeeping do not involve a "sale" of anything by the bank; rather a bank "sells" the use of money (*i.e.*, loans), and the proper measure of the dollar volume of its business is the charges it makes for the use of that money (*i.e.*, interest). See *Wirtz* v. *Savannah Bank & Trust Co. of Savannah*, 362 F. 2d 857, 863 (C.A. 5). Similarly, the collection of judgments by a law firm does not constitute "sales made or business done" by the firm; what the law firm sells are its services in collecting debts owed to its clients or in obtaining judgments, and the dollar volume of this business for purposes of the Act is accordingly measured by the firm's fees. Petitioners' situation is significantly different from that of the bank or the law firm, since petitioners not only sell their management services to the building owners (the volume of which is measured by commissions), but they also sell rental space to the buildings' tenants.[16]

[16] For these reasons, the Secretary has always distinguished between rental collection agencies and building management companies. See, *e.g.*, Opinion Letters Nos. 182 (September 9, 1963) and 227 (January 31, 1964), 91 Wage and Hour Manual

D. THE DECISION OF THE COURT OF APPEALS FOLLOWS THE WEIGHT OF JUDICIAL PRECEDENT

Contentions such as petitioners here make have been rejected by every appellate court that has considered the rent/commissions issue. In addition to the decision below in the instant case, see *Hodgson* v. *Arnheim & Neely, Inc.*, 444 F. 2d 609, 612 (C.A. 3), reversed on other grounds *sub nom. Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512; *Wirtz* v. *Jernigan*, 405 F. 2d 155 (C.A. 5); *Wirtz* v. *First National Bank and Trust Co.*, 365 F. 2d 641 (C.A. 10); cf. *Montalvo* v. *Tower Life Building*, 426 F. 2d 1135 (C.A. 5).[11]

In *Jernigan*, *supra*, the employer, a restaurant owner who operated a Greyhound bus agency on the same premises, argued that his annual "sales" from the bus agency operation should be measured by his commissions and not by the ticket receipts, which he

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1034c, 1024, CCH Administrative Rulings ¶30,771 and ¶30,820; unnumbered opinion letter of the Administrator dated September 28, 1967, 91 Wage and Hour Manual 1034g. Since the activities of a collection agency result not in sales of space but only in the collection of rents, the size of its business is properly measured by its commissions, which represent the price paid for its services. These consistent and long-standing interpretations by the administrators of the Act are "entitled to great weight." *E.g.*, *Roland Co.* v. *Walling*, 326 U.S. 657, 676; *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 549. See also *Idaho Metal Works* v. *Wirtz*, 383 U.S. 190, 205, 207–208; *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140.

[11] The "split of authority" claimed by petitioners (Br. 12–13) relates to two district court cases of considerably earlier vintage (*Schmidt* v. *Randall*, 160 F. Supp. 228 (D. Minn.); *Mitchell* v. *Carratt*, 160 F. Supp. 261 (S.D. Fla.)). Both of those cases, which involved fact situations identical to that in *Jernigan*, were expressly disapproved in the *Jernigan* opinion, 405 F. 2d at 158–159.

transmitted to Greyhound. The district court agreed, stating that "[o]nly the commissions or other compensation received by Defendant for his own account * * * constitute a part of [his] 'dollar volume of sales'" (*Wirtz* v. *Jernigan*, 18 WH Cases 111, 115, 55 CCH Lab. Cas. ¶ 31,948 (S.D. Ala.)). The Fifth Circuit reversed, holding that the total proceeds from the ticket sales had to be included in determining the employer's annual dollar volume of sales. In reaching this result, the court emphasized that the restaurant owner did not exercise a "mere custodial function" with respect to the bus agency operation, as does for example the store proprietor who "permits a vending machine to be placed on his premises" (405 F. 2d at 159), but provided "a whole range of facilities and service in connection with his transportation function" (*id.* at 158–159).

The *Jernigan* case cannot properly be distinguished, as petitioners suggest (Br. 13), on the ground that the defendant there owned his own establishment. Jernigan was not engaged in selling building space but in selling space on buses, which he neither owned nor operated. Nor did he "own" the receipts from these sales, but, like petitioners, he was required to remit the receipts to his principal.

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[12] Although *Jernigan* involved the retail establishment exemption of Section 13(a)(2) rather than the enterprise coverage provision of Section 3(s), the application of both provisions depends upon the same definition of "sale" contained in Section 3(k) of the Act, and the Senate Report on the "enterprise" provisions explicitly stated that gross sales should be measured in the same way for both sections. See note 5, *supra*.

The governing principle is further illuminated by *Montalvo v. Tower Life Building*, *supra*, in which the court rejected an insurance company's argument that its gross sales should not include any policy premiums that are the property of its selling agents. The court held that "the seller's *disposition* of the money paid by a purchaser cannot reduce the gross amount of the sale" as "'measured by *the price paid by the purchaser*'" (426 F. 2d at 1142). Similarly, here the price paid by the purchasers to whom petitioners sell rental space is measured by the gross rental receipts."

II. PETITIONERS ARE THE EMPLOYERS OF THE BUILDING MAINTENANCE EMPLOYEES FOR COVERAGE PURPOSES

This action was brought against petitioners on the theory that the workers at the buildings managed by petitioners are employed in petitioners' enterprise. This theory is firmly rooted both in the language of the Act itself and in the economic realities of the relationship between petitioners and these workers. Nothing in the language or history of the statute, the

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[11] Should this Court decide, contrary to our contention, that the size of petitioners' real estate management operations is to be measured by their commissions, that conclusion would not be dispositive of the ultimate coverage issues in this case. Petitioners also sell insurance and real estate, and inclusion of insurance sales would likely bring their annual gross volume of sales made or business done to more than $500,000. The question whether the insurance, real estate sales, and real estate management aspects of their business are "related activities" for enterprise coverage purposes is one that would be appropriate for determination by the district court on remand, if the Court were to reverse the court of appeals on the commissions/rents issue.

decided cases, or the application of sound reason suggests a contrary conclusion.

A. THE CONCLUSION OF THE COURT OF APPEALS THAT THE BUILDING WORKERS ARE EMPLOYED IN PETITIONERS' ENTERPRISE IS REQUIRED BY THE PROVISIONS OF THE ACT AND THE REALITIES OF THE ECONOMIC RELATIONSHIPS INVOLVED

In our view, the correct resolution of the "employment" issue turns on two simple and straightforward propositions, both of which lead to the conclusion that the building workers are employed in petitioners' enterprise and entitled to the benefits of the Act flowing therefrom: (1) The clear language of the Act requires that conclusion; and (2) the workers are hired, fired, and controlled by petitioners and are essential to the conduct of petitioners' building management enterprise and are therefore, as a matter of economic reality, employed in that enterprise.

Section 6 of the Act, 29 U.S.C. 206, provides that "[e]very employer shall pay to each of his employees who * * * is employed in an enterprise engaged in commerce" the prescribed minimum wage, and Section 7, 29 U.S.C. 207, imposes overtime requirements in substantially identical language. The terms "employer", "employee", and "employed" as used in these provisions are defined in Section 3.

"Employer" is defined in Section 3(d) to include "any person acting directly or indirectly in the interest of an employer in relation to an employee * * *." As Mr. Justice White observed in his dissenting opinion in *Arnheim & Neely* (410 U.S. at

525), this language "unquestionably" makes the management company the employer of these employees for purposes of the Act, as petitioners concede (Br. 16).

"Employee" is defined in Section 3(e) to include "any individual employed by an employer * * *." Nothing in this definition affords any support for petitioners' rather unusual contention (Br. 20) that they can be employers of these workers without the workers being their employees.

This contention—which is, in effect, that the workers to whom petitioners bear the relationship of employer are somehow not "employed by" them—founders, in any event, on the definition of "employ" in Section 3(g), which "includes to suffer or permit to work." Since petitioners do the hiring and firing, they "employ" the workers within the plain meaning of this statutory definition.

Petitioners suggest that the fact that they are defined as employers by Section 3(d) should not be dispositive of the applicability of Sections 6 and 7 to their relationship with the building workers (Br. 20-21). But nothing in the language of the Act supports this suggestion that these key terms may have a different meaning as used in the latter provisions. Indeed, Section 3, which is entitled "Definitions", plainly states that it defines the terms "[a]s used in this chapter." There would, after all, be little point in having a definitional provision in a statute if the definitions it sets forth were not to be applied to the interpretation of its substantive provisions.

Furthermore, contrary to the underlying thesis of the brief of the *amicus* Realty Advisory Board, the conclusion that these workers are employed in petitioners' enterprise is supported by much more than a mere literal application of the statutory definition. Petitioners' relationship to these employees is more than a derivative or technical one arising out of a formalistic application of a label as an agent; it is far more than the "flimsy and tenuous" relationship to which *amicus* adverts (Br. 5). Every significant incident of the building maintenance workers' employment—hiring, discharge, job assignments, hours of work, supervision of work, and payment—is controlled by petitioners. Thus, petitioners not only meet the liberal criteria for "employer" status contained in the Act, they fully satisfy the far more stringent common law test, as they concede (Br. 24).

Indeed, to the extent the roles of the building owners and petitioners can be characterized as primary and secondary with relation to these employees, it is petitioners who are the primary employers by any applicable standards. The management contract gives the building owners no role and not even a veto power with respect to hiring, discharge, and job supervision, all of which are within petitioners' exclusive province (even though, as indicated in the Statement, *supra*, p. 6, petitioners' apparent practice is to secure the approval of the owners for the assignment of an individual worker to more than one building). The sole contractual power of the building owners is

the approval of overall operating budgets for their buildings, which of course include items for labor expense (App. 52–53, 60–61).[14]

Apart from the specifics of the working relationship between petitioners and the building maintenance employees, the determination of this issue by the court of appeals is further supported by the fact that the work done by the employees is not only essential to the successful performance of petitioners' other contractual obligations to the building owners, but it is as much an "integral part" of petitioners' independent real estate management business (see *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 729) as is the work of their clerical staff and other admitted employees. In short, petitioners not only "stand in the shoes of the building owners" with respect to the employment of the building maintenance workers; they employ these workers as indispensable executors of a major part of the operation

[14] It is, of course, immaterial that the actual hiring and supervision of the building maintenance workers is handled by the "project manager" or "maintenance superintendent" employed at each building. The superintendents are hired by petitioners and are under the direct supervision of the area managers, who are admittedly employees of the petitioners and who have a "veto" power over any decisions of the superintendents "with respect to hiring, firing and setting wage rates" (App. 34, 43–46). Contrary to petitioners' statement (Br. 23), the superintendents do not review the budgets with the building owners. According to the stipulation, "Defendants' [petitioners'] officials review and revise the budget and present it, with their recommendation, to the project owner for approval. The maintenance superintendent does not normally discuss the formal budget with the owner" (App. 45).

of petitioners' own business.

Whenever this question has arisen in cases involving facts similar to those presented here, the courts have, with one exception, imposed monetary liability upon building management companies for their failure to observe the Act's requirements. See *Shultz* v. *Arnheim & Neely, Inc.*, 324 F. Supp. 987, 997–998 (W.D. Pa.), affirmed on this issue *sub nom. Hodgson* v. *Arnheim & Neely, Inc.*, 444 F. 2d 609, 611–612 (C.A. 3), reversed on other grounds *sub nom. Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512; *Greenberg* v. *Arsenal Bldg. Corporation*, 144 F. 2d 292, 294 (C.A. 2), reversed in part on other grounds *sub nom. Brooklyn Bank* v. *O'Neil*, 324 U.S. 697; *Asselta* v. *149 Madison Avenue Corporation*, 65 F. Supp. 385, 389 (S.D. N.Y.), affirmed, 156 F. 2d 139 (C.A. 2), affirmed, 331 U.S. 199; *Barrow* v. *Adams & Co. Real Estate*, 46 N.Y.S. 2d 357, 359–360 (Munic. Ct.).[15] Similarly, a building management company has been held to be an employer for purposes of obligations imposed by the National Labor Relations Act even though the building owner, an international organization, was specifically exempt. See *Herbert Harvey, Inc.* v. *National Labor Relations Board*, 385 F. 2d 684, 685–686 (C.A.D.C.); *Herbert Harvey, Inc.* v. *National*

[15] The sole decision holding that suit could not be brought against the building management company, *Mungovan* v. *Manierre*, 7 Lab. Cas. para. 61,646 (N.D. Ill.), is a district court decision rendered in 1943, prior to the decisions in any of the cases cited above.

Labor Relations Board, 424 F. 2d 770, 774 (C.A.D.C.); cf. *Wabash Radio Corp.* v. *Walling*, 162 F. 2d 391, 394 (C.A. 6).

The employment relationship existing between petitioners and the building maintenance workers is not destroyed by the provision in petitioners' contracts with the building owners that such workers are "deemed employees of [o]wners" (App. 53, 60). As this Court emphasized in *Rutherford Food Corp.* v. *McComb, supra*, the determination of whether there is an employment relationship subject to the Act depends not on any "label" used to describe the relationship, but on the Act's "own definitions" (331 U.S. at 729). See also *McComb* v. *Homeworkers' Handicraft Cooperative*, 176 F. 2d 633, 636 (C.A. 4), certiorari denied, 338 U.S. 900; *Mitchell* v. *Strickland Transportation Co.*, 228 F. 2d 124, 126 (C.A. 5); *Mitchell* v. *John R. Cowley & Bro., Inc.*, 292 F. 2d 105, 107–108 (C.A. 5). Nor do the Act's definitions depend on how the building maintenance workers may view their relationship.[10] *Gulf King Shrimp Company* v. *Wirtz*, 407 F. 2d 508, 512 (C.A. 5).

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[10] In fact, however, nothing in the record supports petitioners' contention that the building maintenance workers "feel allegiance to the [building] owner" (Br. 23). On the contrary, it was stipulated that even the superintendents "may not know who the owners of the project[s] are" (App. 46) and that they "look to the defendants [petitioners] for supervision and direction" (*ibid.*). Although building maintenance workers have generally remained with a building after petitioners lost the building management contract, this presumably was with the agreement of any new building management company and was likely to have been for reasons other than "allegiance" to a building owner whom none of the workers knew.

B. PETITIONERS' REMAINING ARGUMENTS DO NOT SUPPORT THEIR CONTENTION THAT THE BUILDING MAINTENANCE WORKERS ARE NOT THEIR EMPLOYEES

1. Petitioners contend (Br. 15–18) that the decision of the court of appeals overrules *Maryland* v. *Wirtz*, 392 U.S. 183, by expanding the category of employers subject to the requirements of the Act. *Maryland* did not involve any question of the definition of "employer", but rather questions regarding the constitutionality of the "enterprise" concept, which, to the extent they may be relevant here, were resolved favorably to the government's position in *Arnheim & Neely*. The class of "employers" has remained unchanged since the passage of the Act in 1938, and it is apparent from the *Greenberg* and *Asselta* decisions, *supra*, that building management companies are not, as petitioners suggest, a new class of employers.

The reason apartment house management companies were not generally covered before the 1966 enterprise amendments had nothing to do with their status as employers under the Act; it was because apartment houses normally have no employees who are themselves engaged in commerce-connected activities. Former Section 3(s) required that each building (or "establishment") have some employees in this category in order for there to be coverage; as amended in 1966, the Act requires only that the enterprise, as opposed to each establishment, have some employees engaged in commerce-connected activities, a requirement almost always satisfied by the traditionally covered activities of a management company's central office personnel.

Nor is it accurate to suggest that the decision of the court of appeals makes coverage "illusory" because it could be terminated by the discharge of petitioners as building managers, although "[n]othing has changed as far as the employee is concerned" (Br. 17–18). The loss of coverage in such a case would result from the highly relevant change that petitioners would no longer be the employers of the workers, and the workers would thus no longer be employed in a covered enterprise.

Finally, the charge that the government's theory ignores petitioners' status as an agent does not further petitioners' position. The mere fact that petitioners label themselves "agents" does not confer immunity from the Act.[17] The Act contains no exemption for agents; on the contrary, Section 3(d) was clearly written for the purpose of imposing responsibility upon an agent, and, as the court of appeals observed in *Greenberg* v. *Arsenal Bldg. Corporation, supra,* 144 F. 2d at 294, "the section would have little meaning or effect if such were not the case."

2. Petitioners next argue that they are not employers under Section 3(d) because they do not act "in relation to an employee" (Br. 18–19). This is a rather puzzling contention, since it is difficult to understand what petitioners are acting in relation to in hiring, supervising, and paying the building workers

[17] Notwithstanding their self-assigned status as "agents," it seems clear that petitioners are independent contractors rather than servants in their relationship to the building owners. See ALI, *Restatement of Agency 2d* § 220 (1958).

if not "in relation to an employee." This statutory language was clearly meant to distinguish between persons such as petitioners, who were to be covered, and persons such as lawyers, accountants, and advertising agents who might act "in the interest of an employer" but would not be covered because they did not do so in relation to the employee.

The case of *McComb* v. *McKay*, 164 F. 2d 40 (C.A. 8), relied on by petitioners, would be apposite if the Secretary were seeking to fasten liability on the building superintendents, who conduct the day to day supervision of the building workers under the general direction and control of petitioners. However, since the building superintendents are themselves simply employees of petitioners and not, like petitioners, independent business entrepreneurs, they would fall within what amounts to a "fellow servant" exception to Section 3(d) recognized in *McKay*.

Other cases cited by petitioners (Br. 21) are not helpful to their position. In *Hodgson* v. *Royal Crown Bottling Co., Inc.*, 324 F. Supp. 342 (N.D. Miss.), affirmed, 465 F. 2d 473 (C.A. 5) (bottling company held liable with respect to drivers' helpers), and *Rutherford Food Corp.* v. *McComb*, *supra*, as in *McKay*, the intermediary was merely an employee of the person found to be liable as an employer, and not an independent entrepreneur. In *Maddox* v. *Jones*, 42 F. Supp. 35 (N.D. Ala.), it was held that the intermediary, as an independent contractor, was the party liable for payment of the statutory wages. If the principle of

Maddox were applied to the present case, petitioners would be considered the sole employers of the building workers and would be liable (see note 19, *infra*). In *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, it was held that the persons involved were not employees, a question unrelated to that posed [illegible] here. No "intermediaries" or "agents" were involved in *United States* v. *Rosenwasser*, 323 U.S. 360, or in *Williams* v. *Terminal Co.*, 315 U.S. 386, in both of which the employees were found to be covered under the Act. In the only other case cited by petitioners, *Shultz* v. *Isaac T. Cook Company*, 314 F. Supp. 461 (E.D. Mo.), the district court excluded one building from the management company's enterprise based on its findings that the building maintenance employees, unlike those here, were neither hired, fired, nor controlled by the management company and were, therefore, not its employees.

3. Petitioners also claim (Br. 21–25) that the holding of the court of appeals that they are employers of the building workers does not comport with the "economic reality" test developed by this Court in Fair Labor Standards Act cases (*e.g.*, *Rutherford Food Corp.* v. *McComb*, *supra*, 331 U.S. at 727). But this test has never been applied, and never was intended, to defeat coverage by overcoming a finding of an employment relationship based upon both the language of the Act itself and the common law standards for such relationships. On the contrary, it was fashioned by this Court in interpreting and applying the social legislation of the 1930s, including the Fair Labor

Standards Act, which defined the employment relationship in much "broader or more comprehensive" terms than the common law. *United States* v. *Rosenwasser, supra,* 323 U.S. at 362. As explained in *Rutherford Food, supra,* the "economic reality" test is designed to bring within, rather than exclude from, such legislation "persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category" (331 U.S. at 729). See also *Goldberg* v. *Whitaker House Coop.,* 366 U.S. 28.

Wholly apart from the expansive purpose of the "economic reality" test, the economic realities of petitioners' relationship to the building workers hardly entitle them to some unwritten exemption from the requirements of the Act. The only significant connection that petitioners are able to adduce between the building owners and the workers (and, correspondingly, the only exception to petitioners' full control over these employees) is in the area of responsibility for payment of salaries.[14] But petitioners are not relieved of their legal responsibilities as an employer because they do not bear the cost of the wages paid to the building maintenance workers. The courts, including this Court, have repeatedly held that there may be

[14] Even with respect to this matter, it is by no means clear that petitioners, who are concededly employers of the building workers by common law standards, can successfully escape their duty to pay compensation to their employees by delegation to the building owners. They cite no authority for the proposition that, should the building owners fail to pay the workers' salaries, the workers could not look to petitioners for payment under State contract law as well as under the Act.

an employment relationship in a variety of situations where the compensation is derived from sources other than the employer's pocketbook. See, *e.g.*, *Williams* v. *Terminal Co.*, *supra*, 315 U.S. 386; *Southern Ry. Co.* v. *Black*, 127 F. 2d 280 (C.A. 4). As the Fourth Circuit pointed out in *Southern Ry.* when it held that "red caps" were employees of the railroad despite the fact that they were compensated by the passenger (*id.* at 281–282):

> The determinative factor is not the source of their compensation, but the fact that they render services which are necessary to the proper running of [petitioners' business], that they are hired or selected [by petitioners] and permitted by them to render these services, that they are subject to the general supervision and control of [petitioners] in rendering the services and that the [petitioners] have the power to discharge them. * * *

Under these tests, petitioners are, as held by the court below, an "employer" of the building maintenance workers and are responsible under Sections 6 and 7 of the Act for their unpaid statutory wages.

Finally, the entire thrust of petitioners' "economic reality" argument is based on the erroneous premise that there can be only one employer. This contention has been repeatedly rejected by this Court and other courts, not only in the context of real estate management companies (see *Greenberg*, *Asselta*, and other cases cited at pp. 29–30, *supra*), but also in other contexts under both the Fair Labor Standards Act and the National Labor Relations Act. See, *e.g.*, *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481; *Hodgson* v. *Okada*

Farms, Inc., 472 F.2d 965 (C.A. 10); *Hodgson* v. *Griffin & Brand of McAllen, Inc.*, 471 F.2d 235 (C.A. 5), petition for certiorari pending, No. 72-1395; *Beaver* v. *Jacuzzi Brothers, Inc.*, 454 F.2d 284, 285 (C.A. 8); *National Labor Relations Board* v. *Jewell Smokeless Coal Corporation*, 435 F.2d 1270, 1271-1272 (C.A. 4)."

4. The arguments advanced by the *amicus* Realty Advisory Board also fail to show the absence of an employment relationship between petitioners and the building maintenance workers. Fundamentally, its brief seeks to reargue the proposition that the "enterprise" amendments were designed to protect small businesses from the payment of minimum wages and observance of the overtime requirements, and that this "purpose" should override the language of the Act itself and the other purposes of the legislation. To the extent this contention has any relevance, it bears on the issue of the proper definition of an "enterprise" and was rejected by this Court in *Arnheim & Neely*. Neither the 1961 nor the 1966 amendments to the Act involved any change in the definition of "employer", "employee", and "employ" in Section 3 or in the meaning and use of those terms in Sections 6 and 7.

The *amicus* attempts to establish (Br. 18-21),

[10] To the extent that the district court's decision in *Maddox* v. *Jones*, *supra*, suggested that a joint employment relationship could not exist between employees of an independent contractor and the person engaging the services of the independent contractor, it is contrary to all of the more recent appellate decisions cited above. Moreover, *Maddox*, if correct, would support the proposition that only petitioners, and not the building owners, are liable under the Act.

through its discussion of such cases as *Wirtz* v. *Columbian Mutual Life Ins. Co.*, 380 F. 2d 903 (C.A. 6), that the building owners are employers of these employees, thereby indicating that the employees' rights to the benefits of the Act could be founded upon their relationship to the owner if the latter's "enterprise" were covered under the Act. That petitioners, in their role as agents, would have derivative liability if the building owners were liable by virtue of their enterprises (even though petitioners' enterprise were not covered) is true but irrelevant, since the case turns not on a theory of derivative liability but on the workers' employment in petitioners' building management enterprise.

The *amicus* errs in asserting that the *Greenberg* and *Asselta* decisions somehow stand for the proposition that the management company is not the "actual" employer of the people it uses to execute its building management function (Br. 25). While those decisions do indicate that derivative liability exists—a proposition with which we have no quarrel—they contain nothing to suggest that the building workers may not be considered direct employees of the management company, or that a person who has derivative liability is thereby exempted from direct liability for his employees.

The recurring fault in the *amicus'* analysis of the employer/employee issue is the assumption that the principal reason Congress enacted the Fair Labor Standards Act was to protect small businesses from payment of the minimum wage (*e.g.*, Br. 18, 29) rather than to raise the standards of pay and work-

ing conditions for workers at the lower end of the economic spectrum." It is on that erroneous premise that the *amicus* constructs an argument that because the building owners' enterprises are too small to be

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[39] There is, of course, no broad exemption for small businesses, as suggested by the *amicus*. Thus, the Act's coverage has always applied to employees engaged in commerce or in the production of goods for commerce, whether their employer be a large or a small business. See, *e.g.*, *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388 (Act applied to a custom furniture establishment which also fabricated airplane parts and which had an annual dollar volume of $99,117); *Wirtz* v. *Floridice Company*, 381 F.2d 613 (C.A. 5) (Act applied to a company whose annual sales ranged from $55,861 to $89,692). Cf. *Hodgson* v. *A–1 Ambulance Service*, 455 F.2d 372, 373–374 (C.A. 8) (reversing a district court order relieving an ambulance company of its liability under the Act on the ground that otherwise the company would "go out of business" and leave the City of Little Rock without an ambulance service).

Amicus' argument regarding the economic impact of coverage exaggerates the problem. Labor costs represent only a small part of the total cost of operating an apartment house or office building—7.4 percent and 18.6 percent, respectively. *Apartment Building Income Expense Analysis*, 1970, Chicago: Experience Exchange Committee of the Real Estate Boards of the National Association of Real Estate Boards; *1969 Office Building Experience Exchange Report*, Building Owners and Managers Association (1969), p. 4. In any event, the increased costs to the building owners are substantially offset by the economic advantages gained from engaging petitioners. The building owners are the beneficiaries of petitioners' ability to make bulk purchases of supplies, to offer the services of experienced management personnel who also manage other buildings, to provide efficient centralized billing and collection services, and otherwise to operate the buildings more efficiently and at lower cost than would be possible if each building were managed separately.

CONCLUSION

covered,[21] the building workers must be denied the benefits of the Act regardless of the size and coverage of their other (indeed, primary) employer. The Act contains no such deprivation of minimum wage and maximum hour protection for workers simply because application of the Act to a covered enterprise by which they are employed would result in an increase in the cost of that enterprise's services to other, non-covered enterprises; nor is it an unusual economic effect for some or all of the costs of compliance with the Act to be passed along to non-covered persons doing business with the covered enterprise.

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JULY 1973.

[21] While the building owners' enterprises are "small" for the technical purposes of the Act, these are hardly "mom and pop" enterprises. During 1968, the average rental collections at the 30 buildings managed by petitioners amounted to nearly $300,000 per building (App. 17)—which suggests an average asset value of the buildings of several million dollars each

U.S. GOVERNMENT PRINTING OFFICE: 1973

FALK ET AL. *v.* BRENNAN, SECRETARY OF LABOR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 72-844. Argued October 11, 1973—Decided December 5, 1973

Respondent brought this action to enjoin petitioners (hereafter D & F), a fully integrated partnership managing apartment complexes for a fixed percentage of the gross rentals collected from each project, from minimum wage and other violations of the Fair Labor Standards Act. The District Court dismissed the complaint, adopting D & F's contentions that it does not have a $500,000 "annual gross volume of sales made or business done" and thus does not come within the term "enterprise engaged in commerce" as defined in § 3 (s) of the Act, and that it is not an employer, within the meaning of § 3 (d), of the maintenance personnel who are paid from the rentals received at the apartment complexes where they work. The Court of Appeals reversed, holding that D & F met the statutory definition of "employer" and that in determining whether the enterprise satisfies the dollar-volume limitation, it is the gross rentals (which exceed $500,000 annually) that D & F collects at all the apartment complexes that must be considered rather than the gross commissions that D & F receives from the apartment owners. *Held:*

1. D & F, whose managerial responsibilities at each of the buildings give it substantial control of the terms and conditions of the work of employees at those buildings, is an "employer" under the expansive definition of the term in § 3 (d) of the Act. P. 195.

2. D & F sells only its professional management services, and the gross rentals it collects as part of those services do not represent sales attributable to its enterprise. D & F's commissions are therefore the relevant measure of its gross sales made or business done for purposes of the dollar-volume limitation in § 3 (s) (1). Thus, though D & F is an "enterprise" under § 3 (r), *Brennan* v. *Arnheim & Neely, Inc.*, 410 U. S. 512, the Act does not apply to D & F as its commissions are below the § 3 (s) (1) limitation. Pp. 195-201.

Vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which DOUGLAS, WHITE, and MARSHALL, JJ., joined, *post*, p. 202.

Herbert V. Kelly argued the cause for petitioners. With him on the brief were *Franklin O. Blechman* and *E. D. David*.

Andrew L. Frey argued the cause for respondent. With him on the brief were *Solicitor General Bork* and *Sylvia S. Ellison*.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The Secretary of Labor initiated this action against the petitioners, partners in a real estate management company, for an injunction against future violations of various provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U. S. C. § 201 *et seq.*, and for back wages allegedly due to employees affected by past violations of the Act.[1] The petitioners' defense was that they are not "employers"[2] of the employees involved, and that their business is not a single "enterprise" that is subject to the Act's requirements. This latter contention brought together two separate arguments. First, the petitioners contended that their com-

*Howard Lichtenstein and *Marvin Dicker* filed a brief for the Realty Advisory Board on Labor Relations, Inc., as *amicus curiae* urging reversal.

[1] The complaint alleged violations of the minimum wage (29 U. S. C. § 206 (b)), overtime (29 U. S. C. § 207 (a)(2)), and recordkeeping (29 U. S. C. § 211 (c)) provisions of the Act.

[2] Section 3 (d), 29 U. S. C. § 203 (d), states that an "'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee."

bined activities do not constitute an "enterprise," as that term is defined in § 3 (r), 29 U. S. C. § 203 (r). Second, the petitioners argued, even if their business activities do amount to an "enterprise," they are not an "[e]nterprise engaged in commerce or in the production of goods for commerce," as that term is defined in § 3 (s), 29 U. S. C. § 203 (s), because they do not have an "annual gross volume of sales made or business done" of $500,000.[3]

Under the partnership name of Drucker & Falk (D & F), the petitioners render management services for the owners of a number of apartment complexes in the State of Virginia. Under its contracts with the apartment owners, D & F agrees to perform, on behalf of each owner and under his nominal supervision, virtually all management functions that are ordinarily required for the proper functioning of an apartment complex.[4] These contracts are for a stated term of not less than one year. Each party can terminate the arrangement by giving the other party 30 days' notice of his intent to do so. Neither D & F nor any of its partners hold any property interest in the buildings that D & F manages. D & F receives as compensation a fixed

[3] The dollar-volume limitation was $500,000 at all times relevant to this action. 29 U. S. C. § 203 (s)(1). On February 1, 1969, the dollar-volume limitation was reduced to $250,000.

[4] D & F performs all the functions required for leasing, maintaining, and operating the apartment buildings. These include advertising the availability of apartments for rent; signing, renewing, and canceling leases; collecting rents; instituting, prosecuting, and settling all legal proceedings for eviction, possession of the premises, and unpaid rent; making necessary repairs and alterations; negotiating contracts for essential utilities and other services; purchasing supplies; paying bills; preparing operating budgets for the property owners' review and approval; submitting periodic reports to the owners; and hiring and supervising all employees required for the operation and maintenance of the buildings and grounds.

percentage of the gross rentals collected from each project.[5]

The rentals collected by D & F are deposited in local bank accounts.[6] From these accounts it pays all expenses incurred in operating and maintaining the buildings. After deducting its compensation, as well as any other applicable expenses, D & F transmits payments to the various owners on a periodic basis. If disbursements for any apartment complex exceed its gross rental receipts, the owner is required under the contract to reimburse D & F.

The subject of the Secretary's complaint was the wages and hours of the maintenance personnel who work at each of the apartment complexes, the contention being that D & F is in violation of the minimum wage, overtime, and recordkeeping provisions of the Act with respect to these maintenance workers. These employees work under the supervision of D & F and are paid from the rentals received at the apartment complexes where they are employed. They are considered in the contracts between the owners and D & F as "employees of the project owners."

In the District Court, D & F contended that its management activities at the several apartment complexes do not constitute a single "enterprise," as that term is defined in § 3 (r) of the Act, 29 U. S. C. § 203 (r); that, even if its business is a single "enterprise," it does not have the $500,000 "annual gross volume of sales made or business done" required by § 3 (s)(1), 29 U. S. C. § 203 (s)(1), for coverage by the Act; and that it is not an "employer" of these maintenance workers, as that term

[5] The commission that D & F receives varies between 4% and 6%, depending on the particular arrangements with the building owner.

[6] The rents for all the buildings managed by D & F totaled over $7,700,000 in 1967 and over $8,600,000 in 1968.

is defined in § 3 (d), 29 U. S. C. § 203 (d). The District Court agreed with all three of these contentions and dismissed the complaint. The Court of Appeals reversed. It held that the management activities performed by D & F constitute a single "enterprise" for coverage purposes and that D & F meets the statutory definition of "employer" with respect to the maintenance workers. The appellate court also concluded that, in determining whether the enterprise satisifies the dollar-volume limitation, it is the gross rentals that D & F collects at all the apartment complexes that must be considered, rather than, as the District Court had held, the gross commissions that D & F receives from the apartment owners. Since there is no question that these gross rentals exceed $500,000 annually, the court held that D & F is subject to the Act and in violation thereof with respect to the maintenance workers.

We granted certiorari to review this judgment of the Court of Appeals.[7] Two days later, we held, in *Brennan v. Arnheim & Neely, Inc.*, 410 U. S. 512 (1973), that a fully integrated real estate management company that directs management operations at several separately owned buildings was a single "enterprise" for purposes of the Act, thus confirming the holding of the Court of Appeals on that issue in the present case. But our decision in *Arnheim & Neely* did not reach the other two statutory questions raised by D & F. We accordingly

[7] Both the District Court and the Court of Appeals had this case before them twice. Initially, the District Court dismissed the complaint. The Court of Appeals reversed and remanded for further proceedings. *Shultz* v. *Falk*, 439 F. 2d 340. The petitioners sought certiorari, and we denied the writ. *Falk* v. *Hodgson*, 404 U. S. 827 (1971). On remand to the District Court, the petitioners resisted the imposition of judgment and particularly the awarding of prejudgment interest. The District Court rendered judgment against the petitioners and awarded prejudgment interest. The Court of Appeals affirmed, and the petitioners again sought certiorari.

limited the grant of certiorari to questions 2 and 3 presented by the petition:

> "(2) Under the Fair Labor Standards Act to be covered an enterprise must have an 'annual gross volume of sales made or business done' of $500,000. Is this figure to be measured by the gross rentals collected by the agent or by that agent's gross commissions?
>
> "(3) Are maintenance workers employed at the buildings managed by petitioners employees of the apartment owner or of the petitioners?" 410 U. S. 954.

I

As to question 3, the "employees" issue, it is clear that the maintenance workers are employees of the building owners. But we think that the Court of Appeals was unquestionably correct in holding that D & F is also an "employer" of the maintenance workers under § 3 (d) of the Act, which defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U. S. C. § 203 (d). Section 3 (e) defines "employee" to include "any individual employed by an employer." 29 U. S. C. § 203 (e). In view of the expansiveness of the Act's definition of "employer" and the extent of D & F's managerial responsibilities at each of the buildings, which gave it substantial control of the terms and conditions of the work of these employees, we hold that D & F is, under the statutory definition, an "employer" of the maintenance workers. We turn, therefore, to the other question embraced in the grant of certiorari.

II

In *Brennan* v. *Arnheim & Neely Inc., supra,* we held that the integrated operations of a real estate management company satisfied the definition of "enterprise"

under § 3 (r) of the Act. This holding was based upon the conclusion that the management activities met the three statutory tests of an "enterprise": related activities, unified operation or common control, and common business purpose. It is important to understand, however, that the "enterprise" the Court found in *Arnheim & Neely* consisted of the sale of management services by the respondent. The Court did not hold that the separate property interests of each apartment owner were to be considered part of the management enterprise of Arnheim & Neely. Indeed, § 3 (r) and the legislative history of the 1961 "enterprise amendments" to the Act strongly suggest that the use of common agents by independent entities is not sufficient to convert to a single "enterprise" what otherwise are independent businesses.[8] Thus, D & F's enterprise in the present

[8] Section 3 (r), 29 U. S. C. § 203 (r) provides, in pertinent part: "[A] retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact it occupies premises leased to it by a person who also leases premises to other retail or service establishments."

The Senate Report on the 1961 amendments to the Act included the following statements regarding this portion of § 3 (r):

"[T]he mere fact that a group of independently owned and operated stores join together to combine their purchasing activities or to run combined advertising will not for these reasons mean that their activities are performed through unified operation or common control and they will not for these reasons be considered a part of the same 'enterprise.'" S. Rep. No. 145, 87th Cong., 1st Sess., 42.

case, as in *Arnheim & Neely,* consists of and is limited to its combined management activities at the various apartment complexes.

The Act imposes its requirements, not on every "enterprise," but only on an "enterprise engaged in commerce or in the production of goods for commerce." [9] One of the statutory elements of the latter term is the dollar-volume limitation, which in this case is $500,000 annually.[10] The bone of contention between the Secretary and D & F is whether this dollar-volume limitation is to be measured by the annual gross rentals collected by D & F as agent of the apartment owners, or by the gross commissions paid to D & F by the owners as compensation for its management services. Section 3(s)(1), which prescribes the dollar-volume limitation, speaks of "an enterprise *whose* annual gross volume of sales made or business done is not less than $500,000." 29 U. S. C. § 203(s)(1). (Emphasis added.) This statutory language requires that, after determining what the relevant enterprise is, we turn our attention to what *that enterprise* sells or to what business *it* does.

Any doubt about whether the rental of space is a "sale" for purposes of the Act was removed when Congress amended § 3(s) in 1966 to provide that the dollar-volume limitation would henceforth be measured by "annual gross volume of sales made or *business done,*" 80 Stat. 831 (emphasis added). The Senate Report on the 1966 amendments makes clear that the added language was intended to dispel any uncertainty that revenue derived from services, rentals, or loans, even though perhaps not literally "sales," was nevertheless to be considered in

[9] See, *e. g.,* § 6(b) (29 U. S. C. § 206(b)), § 7(a) (29 U. S. C. § 207(a)), and § 11(c) (29 U. S. C. § 211(c)).

[10] The petitioners' gross commissions amounted to slightly more than $434,000 and somewhat less than $463,000 in 1967 and 1968, respectively, the years involved in this litigation.

measuring the dollar-volume limitation of § 3 (s). The Report indicates that the amendment was intended to signify legislative approval of the result in *Wirtz* v. *Savannah Bank & Trust Co.*, 362 F. 2d 857, which so interpreted § 3 (s) as it read before the addition of the "business done" language. As the Senate Report explained:

> "The annual gross volume of sales made or business done by an enterprise, within the meaning of section 3 (s), will thus continue to include both the gross dollar volume of the sales . . . which it makes, as measured by the price paid by the purchaser for the property or services sold to him . . . , and the gross dollar volume of any other business activity in which the enterprise engages which can be similarly measured on a dollar basis. This would include, for example, such activity by an enterprise as making loans or renting or leasing property of any kind." S. Rep. No. 1487, 89th Cong., 2d Sess., 7–8.

But, a determination that rentals are "sales made or business done" within the meaning of the Act does not begin to dispose of the issue before us. The question remains, under § 3 (s)(1), what enterprise made the sales or did the business.

The Secretary contends that the "sales made or business done" by D & F includes the gross rental income of apartments in the buildings that it manages. He argues that the fact that D & F does not own the buildings should not preclude attribution of the rentals to it. D & F argues that it sells only managerial services and thus that the rentals it collects on behalf of the owners are not "sales made or business done" by its enterprise. It contends, therefore, that its gross sales should be measured, not by the rentals it collects from the tenants, but rather by

the management fees that the owners pay it as compensation for its services—*i. e.*, its gross commissions.

The line between a seller of a product and a seller of a service is not always readily discernible, especially when one of the services relates to the sale of a product or, what amounts to the same thing for purposes of the Act, the rental of space. As an abstract proposition, the Secretary is undoubtedly correct in his position that ownership is not necessarily determinative in attributing "sales made or business done" for purposes of the statute. For example, a consignment seller's gross sales might properly be measured by his gross receipts from sales of the product, even though he did not actually hold title to the product that he sold. Realistically, such a seller is in the business of selling the product that is consigned to him, and he is functionally in a position no different from that of a seller who has purchased the product before resale. The only practical difference may be that the "cost of goods sold" element of the profit equation is expended before resale in the one case and after resale in the other.

In the present case, however, we are convinced that the enterprise of D & F is limited to the sale of its professional management services, and, accordingly, that the commissions it receives are the relevant measure of its gross sales made or business done for purposes of the dollar-volume limitation in § 3 (s)(1). D & F collects a number of rentals on behalf of the property owners. In nearly every case, these rentals are paid pursuant to lease agreements of significant duration. Some may predate D & F's management of the premises, and D & F may thus have had absolutely nothing to do with the "sales" underlying the periodic rentals it collects for the owner.[11]

[11] The record does not show what proportion of the rentals is attributable to leases predating D & F's managerial tenure at each

When a lease does expire and is not renewed by the tenant, D & F undertakes to find a new tenant for the owner and serves as agent for the owner in the negotiation and execution of a new lease. With respect to such a lease, a colorable argument can be made for attribution of the rentals to D & F, since its negotiation of a new lease increases, or at least maintains, the volume of rents collected and thus also its percentage compensation. But such an argument does not withstand any but the most superficial analysis.

In the typical commodity sale the seller's remuneration is a function of the gross margin between the cost of the product to him and the resale price. At first blush, the determination of D & F's compensation as a percentage of the gross rentals seems somewhat akin to the margin of the typical seller. Upon reflection, however, a critical difference appears: when a lease is negotiated by D & F, its remuneration is calculated, not from the proceeds derived from that lease, but only from the rentals collected during its managerial tenure, during which period it renders significant and substantial management services beyond its earlier service in negotiating the lease. It is clear, therefore, that the business of the D & F enterprise is not the sale of a product (the rental of realty) but a sale of professional management services. This conclusion follows logically from our holding in *Arnheim & Neely* that the relevant enterprise for purposes of deciding whether a real estate management company is covered by the Act, consists of its "aggregate manage-

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building. When the underlying lease does predate D & F's contract with the owner, however, the total absence of any participation by D & F in the lease transaction, of which the periodic rentals are merely the proceeds, belies any attempt to attribute these rentals to D & F as an index of its gross "sales made or business done."

ment activities" at the various buildings that it supervises. 410 U. S., at 519. In this regard, the commissions received by D & F differ even from the compensation received by the typical broker of realty or stock, whose primary undertaking is to negotiate a sale of the principal's property and whose compensation is calculated on the proceeds of that sale.

On these facts, we think the conclusion is inescapable that D & F vends only its professional management services, and that the gross rentals it collects as part of these services do not represent sales attributable to its enterprise. It follows that the correct measure of the "gross volume of sales made or business done" by D & F is the gross commissions it receives from the apartment owners as compensation for the management services it renders.[12] Since these commissions did not reach $500,000 annually during the period involved in this litigation, it follows that D & F was not an "[e]nterprise engaged in commerce or in the production of goods for commerce," within the meaning of the Act.

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[12] Part II of the dissent suggests that the "annual gross volume of sales made or business done" of D & F's enterprise "must include amounts paid by the building owner to cover operation and maintenance costs, plus the amount paid as commissions." *Post*, at 211. The dissent's rationale is that D & F was in effect paying the operation and maintenance costs itself and then being reimbursed by the apartment owners. Such an argument was not made by the Secretary. Even if such a payment and reimbursement arrangement would cause the operation and maintenance costs to be included in measuring "annual gross volume of sales made or business done" (which we do not decide), it is clear that such an arrangement did not exist between D & F and the building owners. The rentals were collected by D & F as the agent for the owners and were placed in bank accounts on their behalf. D & F paid the operation and maintenance costs of the buildings from the owners' funds pursuant to its agreement with, and on the authority of, the owners.

The judgment of the Court of Appeals is vacated and the case is remanded to the District Court for further proceedings consistent with this opinion.[13]

It is so ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join, concurring in part and dissenting in part.

I concur in the Court's holding that petitioners are "employers" of the maintenance workers who service the apartment buildings managed by D & F.

I dissent, however, from the holding that, for the purposes of § 3 (s)(1), "the enterprise of D & F is limited to the sale of its professional management services," and that those services must be measured by D & F's commissions. The record in this case leaves no doubt whatever that D & F's enterprise activities resulted in both the sale of professional management services *and* rental space. While the Court acknowledges that sales of rental space are "sales made or business done" within the meaning of § 3 (s)(1), *ante*, at 197, it nevertheless decides that rental sales should not be attributed to D & F because: "when a lease is negotiated by D & F, its remuneration is calculated not from the proceeds derived from that lease, but only from the rentals collected during its managerial tenure, during which period it renders

[13] A footnote in the Secretary's brief states that, in addition to its management services, D & F also sells insurance and real estate. These operations might bring D & F's "annual gross volume of sales made or business done" to more than $500,000 for the years in question if the insurance, real estate sales, and real estate management operations of D & F's business are "related activities" for enterprise coverage purposes under § 3 (r) of the Act. We leave for the District Court to consider the Secretary's contention.

significant and substantial management services beyond its earlier service in negotiating the lease." *Ante*, at 200.

To be sure, D & F's remuneration for renting an apartment may not be subject to precise calculation at the time of the sale: compensation for the sale is derived from D & F's percentage of monthly rent receipts, which includes D & F's compensation for building operation and maintenance; and conceivably the building owner might terminate D & F's management contract before the tenant makes all the monthly payments required under the lease, thus reducing D & F's compensation for the sale of the rental space. It is also true that after selling the rental space, D & F performs other significant and substantial management services. But these rather unsurprising observations hardly supply a basis for the Court's conclusion that: "It is clear, therefore, that the business of the D & F enterprise is not the sale of a product (the rental of realty) but a sale of professional management services," and that such services must be measured by commissions. Neither the facts in this case, nor the plain words of § 3 (s)(1), and the uncommonly unambiguous legislative history of that section support the Court's conclusion that Congress meant to measure one particular enterprise activity to the exclusion of others.

I

Section 3 (s)(1) limits coverage under the Act to those enterprises "whose annual gross volume of sales made or business done is not less than $500,000 . . . ." [1] 29 U. S. C.

[1] Section 3 (r) of the Act, 29 U. S. C. § 203 (r), defines "enterprise" to mean:

"the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment

§ 203 (s)(1). The term "sales" employed in § 3 (s)(1) is defined with specificity in § 3 (k) of the Act, 29 U. S. C. § 203 (k), to mean "*any* sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition" (emphasis added). Those are simple and entirely unambiguous words that do not even remotely imply that only *some* "sales made or business done" should be measured. Clearly, § 3 (s)(1), in terms, embraces the gross volume of apartment leases sold by D & F, as well as the professional management services sold by D & F to building owners.[2]

In addition, even were the wording of § 3 (s)(1) less clear, "[t]his is not a case where perforce we must attempt to resolve a controversy as to the true meaning of equivocal statutory language unaided by any reliable extrinsic guide to legislative intention," *Mitchell* v. *Kentucky Finance Co.*, 359 U. S. 290, 293 (1959). Senate and House Reports concerning the 1961 and 1966 "enterprise amendments" to the Act show explicitly that Congress

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operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor . . . ."

The dollar-volume test of § 3 (s)(1) of the Act, 29 U. S. C. § 203 (s)(1), limits coverage during the period February 1, 1967, through January 31, 1969, to those enterprises "whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) . . . ." On February 1, 1969, the dollar-volume test was reduced to $250,000. It is not disputed that each year since February 1, 1969, petitioners have met the dollar-volume requirement of the Act.

[2] In addition to the Court of Appeals below, the Courts of Appeals for the Fifth and Tenth Circuits have held that the leasing of rental property constitutes a "sale" within the meaning of the enterprise provisions of the Act. See *Wirtz* v. *Savannah Bank & Trust Co.*, 362 F. 2d 857 (CA5 1966); *Wirtz* v. *First National Bank & Trust Co.*, 365 F. 2d 641 (CA10 1966).

intended enterprise activities to be measured by *all* "sales made or business done." [3]

Prior to 1961, the protections of the Act were extended only to employees who were themselves "engaged in commerce or in the production of goods for commerce," §§ 6 (a), 7 (a), 29 U. S. C. §§ 206 (a), 207 (a). With the enterprise amendments of 1961, Congress substantially broadened the coverage of the Act to include all employees "employed in an enterprise engaged in commerce," 75 Stat. 67, 69. But not every enterprise meeting the statutory definition in § 3 (r) of the Act was brought within the Act's coverage. Section 3 (s)(1) prescribed a dollar-volume test that limited the Act's coverage to those enterprises that had an "annual gross volume of sales of . . . not less than $1,000,000," *id.*, at 66. The Senate and House Reports show that the dollar-volume test was adopted to establish an economic standard that predicates coverage of the Act upon the size of the enterprise and its impact upon commerce. See H. R. Rep. No. 75, 87th Cong., 1st Sess., 3, 7, 13 (1961); S. Rep. No. 145, 87th Cong., 1st Sess., 6–7, 31 (1961); see also the Staff Report of Labor Subcommittee offered on the floor by Senator McNamara, 107 Cong. Rec. 5840–5842 (1961).

To insure that the term "sales" would not be given a narrow or technical interpretation that might exclude some enterprises that have the requisite dollar volume

[3] A continuance of the judicial practice of liberal interpretation of the Act was clearly contemplated by Congress:

"In keeping with the broad statutory definitions of the coverage phrases used, the courts have repeatedly expressed and adhered to the principle that the coverage phrases should receive a liberal interpretation, consonant with the definitions, with the purpose of the Act, and with its character as remedial and humanitarian legislation." H. R. Rep. No. 1366, 89th Cong., 2d Sess., 10 (accompanying the 1966 amendments to the Act).

of business, but that do not make typical commodity sales,[4] Congress amended the enterprise provisions of the Act in 1966, 80 Stat. 831, by substituting the wording "annual gross volume of sales made *or business done*" (emphasis added), for "annual gross volume of sales," the term employed in the 1961 amendments. The Senate Report fully explains Congress' reasons for changing the terminology:

> "This test . . . is intended to *measure the size of an enterprise* for purposes of enterprise coverage in *terms* of the annual gross volume in dollars (exclusive of specified taxes) *of the business transactions which result from activities of the enterprise*, regardless of whether such transactions are 'sales' in a technical sense.
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> ". . . The addition of the term 'business done' to the statutory language should make this intent abundantly plain for the future and remove any possible reason for misapprehension. The annual gross volume of sales made or business done by an enterprise, within the meaning of section 3 (s), will thus continue [under the 1966 Amendments] to include both the gross dollar volume of the sales (as defined in sec. 3 (k)) which it makes, as measured by the price paid by the purchaser for the property or services sold to him (exclusive of any excise taxes at the retail level which are separately stated), and the gross dollar volume of any other

[4] Questions concerning the scope of the term "sales" in the dollar-volume provision of the 1961 enterprise amendments had arisen in suits brought by the Secretary of Labor to enforce the Act. For example, in *Wirtz* v. *Savannah Bank & Trust Co.*, the defendant bank contended "that the term 'sales' must be given a 'literal interpretation' and . . . would not include rental receipts, interest on loans and securities or income from services." 362 F. 2d, at 862–863 (footnote omitted).

> business activity in which the enterprise engages which can be similarly measured on a dollar basis. *This would include,* for example, *such activity by an enterprise as* making loans or *renting or leasing property of any kind.* S. Rep. No. 1487, 89th Cong., 2d Sess., 7–8 (1966). (Emphasis added.)

Congressional intent, with respect to the dollar-volume test in § 3 (s)(1), could not be more clear: "the business transactions which result from activities of the enterprise" are to be measured. No transactions are excepted from measurement. Nothing in the legislative history suggests that when remuneration for essentially different transactions is in some way commingled, or when an enterprise engages in closely related activities, only those transactions constituting the essence of enterprise should be measured. For the purposes of § 3 (s)(1), the only relevant inquiry is what activities the enterprise engages in, and what sales or business transactions result from those activities. Measurement of the dollar volume of those transactions indicates the size of the enterprise and its impact upon commerce.

Turning to the facts in this case, it is clear from the stipulated record in the District Court that D & F engages in essentially two distinct, though related, activities. First, D & F rents apartments to the public. In this connection, D & F employs a staff of sales personnel who advertise available apartments, interview prospective tenants, and negotiate and renew leases on behalf of the apartment-building owner. Second, D & F operates and maintains apartment buildings. By contract with the building owner, D & F agrees to collect rent; initiate, prosecute, and settle all legal proceedings for eviction, possession of the premises, and unpaid rent; make repairs and alterations; negotiate contracts for utilities and other necessary services; purchase supplies;

pay all bills, including mortgage payments; prepare an operating budget for the building owner's review and approval; submit periodic reports to the owner; and hire, discharge, and supervise all labor and employees required for the operation and maintenance of the premises. Thus, D & F performs both brokerage and management activities. Indeed, the first article of every contract entered into by D & F and a building owner states, "Owners hereby employ and appoint [D & F] as the sole and exclusive *renting and management agent* . . ." (emphasis added).

The business transactions resulting from these activities are quite distinct and subject to separate measurement. D & F's *brokerage* activities result in the sale of rental space to the public. D & F's *management* activities result in a business transaction between D & F and the building owner, *i. e.*, D & F's sale of professional management services.

The Court, however, focuses upon D & F's management activities and measures only the resulting transaction between D & F and the building owners. To be sure, these transactions have an impact upon commerce and must, therefore, be measured under the dollar-volume test. As a result of these transactions, D & F hires and supervises more than 100 personnel who perform all the functions necessary for the efficient operation and maintenance of apartment buildings, and thus engages in activities which clearly induce a flow of men, money, and materials across state lines. But, as significant as this impact upon commerce may be, it pales by comparison to the impact caused by D & F's brokerage activities. D & F employs a special staff of personnel to sell apartments, whose duties include developing marketing strategies, placing advertisements in various media, interviewing prospective tenants, and negotiating

leases. These activities generate a flow of millions of dollars per year in gross rent receipts, with consequent impacts upon commerce too numerous and obvious to trace here. The significant impact of D & F's brokerage activities upon commerce is not diminished by the fact that the apartment buildings are owned by others. It is D & F's brokerage activities—not the building owners'—that result in the sale of rental space. In this respect, D & F, as a broker selling rental space owned by others, is indistinguishable from the salesman of consignment goods, whose "sales made or business done," the Court concedes, *ante,* at 199, must be measured by the gross receipts from sales of the product.

Ignoring D & F's brokerage activities and their resulting transactions, therefore, not only contradicts Congress' clearly expressed intention that transactions resulting from *any* activity of the enterprise be measured, but also undermines the effectiveness of the dollar-volume test as a measure of an enterprise's size and impact upon commerce.[5] "Where both the words of a statute and its legislative history clearly indicate the purpose of Congress, it should be respected," *Schwegmann*

[5] An enterprise's dollar volume of "sales made or business done" is measured by its "gross receipts," see part II, *infra.* The record indicates that D & F collected gross rent receipts of $7,752,600.86 in 1967 and $8,607,086.04 in 1968. That portion of the gross rent receipts attributable to D & F's sales of rental space constitutes the proper dollar-volume measure of D & F's brokerage activities. As discussed in part II, *infra,* D & F's "gross receipts" for its management activities must be measured by the commissions D & F receives for such services plus any reimbursements D & F receives for the cost of men and materials. Since D & F is paid a single commission for both its brokerage and management activities, that portion representing compensation for its sale of rental space must be subtracted from the total commission in order accurately to measure that portion of the commission attributable to its professional management services.

Bros. v. *Calvert Distillers Corp.*, 341 U. S. 384, 402 (1951) (Frankfurter, J., dissenting).

II

Even proceeding on the Court's erroneous basic premise, however, D & F's sales of professional management services exceed $500,000 when computed, as Congress required, under the specific regulations promulgated by the Wage and Hour Division of the Department of Labor to effectuate § 3 (s)(1).[6] As a guide to making computations under § 3 (s)(1), Congress instructed that:

> "The method of calculating the requisite dollar volume of sales or business [for enterprise coverage purposes] will be the same as is now followed under the law with respect to calculating the annual dollar volume of sales in retail and service establishments, and in laundries under the exemptions provided in section 13 (a)(2), (3), (4), and (13) of the act. The procedure for making the calculation is set forth in the Department's Interpretative Bulletin [pertaining to retailers of goods and services]. As it is there stated, the 'annual dollar volume of sales' consists of the *gross receipts from all types of sales* during a 12-month period." S. Rep. No. 145, 87th Cong., 1st Sess., 38 (1961). (Emphasis added.)

This "gross receipts" method of computation is presently embodied in regulations which state: "The annual gross dollar volume of sales made or business done of an enterprise or establishment consists of the *gross receipts from all of its sales or its volume of business done* during a 12-

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[6] Section 602 of Pub. L. 89-601, 80 Stat. 844, provides that the Secretary of Labor is "authorized to promulgate necessary rules, regulations, or orders with regard to the [1966 enterprise] amendments made by this Act."

month period," 29 CFR § 779.265. (Emphasis added.) See also 29 CFR §§ 779.259, 779.266–779.269.

Gross receipts from "sales" of professional services are not necessarily limited to commissions. True, if the "sale" is only of the personal labor of the seller, commissions may well be the sole measure of "sales made or business done" because commissions are the seller's only gross receipts. And where, in addition to his own labor, the seller of professional services provides, for a commission, personnel and materials as an integral part of the professional services rendered, the commission still constitutes the gross receipts for the sale of services. If, on the other hand, the purchaser of the professional services reimburses the seller for the costs of men and material and also pays a commission, plainly "gross receipts" under the statute and regulation are the reimbursement plus the commission.

D & F was compensated for its professional management services on a cost-plus-commission basis. It employed maintenance workers and purchased materials necessary for the operation and maintenance of the apartment buildings. By contract, the building owner agreed to reimburse D & F for these operation and maintenance costs,[7] and, in addition, to pay D & F a commission.[8] Thus, D & F's gross receipts must include amounts paid by the building owner to cover operation and maintenance costs, plus the amount paid as commissions.

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[7] The apartment building owners never actually sent funds to D & F to cover its costs and commissions. Rather, these sums were deducted by D & F from the total receipts it collected from the tenants of each apartment building.

[8] D & F's commissions are either 4% or 6% of gross rent receipts, depending upon the extent of the services it agrees to render.